

programs, ... work attendance and productivity, conduct record, participation in programs, cooperative general behavior, and appearance." Id. 138(B). The amendments also eliminated the opportunity for inmates to earn credits by donating blood.

In Ekstrand v. State, 791 P.2d 92 (Okla. Crim. App. 1990), the Oklahoma Court of Criminal Appeals held that application of the amended statute to inmates convicted prior to November 1, 1988, "runs afoul of the prohibition of ex post facto laws." Id. at 95. The same court clarified its Ekstrand holding in State ex rel. Maynard v. Page, 798 P.2d 628 (Okla. Crim. App. 1990), where it stated that an inmate in Oklahoma was "entitled only to credits which were allowed under the law on the date the crime giving rise to his conviction was committed." Id. at 629.

After Ekstrand and Page, the DOC revised its system of awarding credits to permit inmates who committed their offense of conviction before November 1, 1988, to petition the Department for credits earned under the preamended version of the statute. The DOC, however, would not apply such credits to an inmate's sentence until 30 days before his discharge. Moreover, the DOC required the inmates themselves to keep track of the credits they earned under the old law.

In Scales v. Brewer, Unpub. Op., Case Nos. CIV-90-369-S and CIV-90-375-S (E.D. Okla., Apr. 7, 1993), the District Court for the Eastern District of Oklahoma adopted the findings of a federal magistrate judge who ruled that the DOC's new procedure for awarding time credits was also unconstitutional. The magistrate ruled that the DOC's application of the statute was ex post facto as applied to inmates who committed their offense of conviction before November 1, 1988, because it put such prisoners "at risk of continued confinement beyond their discharge date." Id. at 5.

Following Scales, the DOC again revamped its system of awarding time credits. The DOC now tabulates for each inmate how many credits he has earned under each version of the statute on a monthly basis and automatically awards the inmate the greater of the two totals.

Turnham v. Carr, 34 F.3d 1076, 1994 WL 413243 (10th Cir. Aug. 5, 1994) (unpublished opinion).

Effective August 1, 1993, the DOC also instituted a new policy

whereby in the future an inmate serving a pre-November 1, 1988 sentence would receive a flat number of credits based upon his job assignment rather than days actually worked. Consequently, all Ekstrand inmates from that point forward working for Oklahoma State Industries (OSI) were accorded sixty-two credits per months, or two credits for each day of the month regardless of whether the inmate actually worked.

Petitioner does not dispute that he received all credits that he was entitled to by law with regard to the time he worked at the OSI Tag Plant from approximately April 1990 to May of 1993. He argues, however, that he is entitled to the difference between the credits he received for working in the tag plant--an average of forty-four credits per months--and the credits which Ekstrand inmates are now receiving for such work under the new DOC policy. Respondent contends that Petitioner's contention is without merit. The Court agrees.

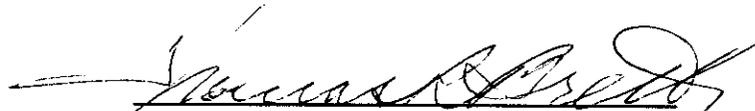
The fact that DOC has started giving Ekstrand inmates more than they are entitled to does not entitle Petitioner to a retrospective application of these unearned credits based on a job assignment he previously held. If Petitioner, while serving his pre-1988 sentence, were still working in the O.S.I. Tag Plant, he would also receive such credits. However, he is not entitled to a retroactive application of credits above and beyond that required by Ekstrand and Scales.

Moreover, even if the statutory directive--that a "prisoner . . . shall be entitled" to reduce his sentence by donating blood--

created a liberty interest and required the DOC to establish a blood donation program, see Sandin v. Connor, 115 S.Ct. 2293 (1995), Petitioner should not be allowed to donate blood for the purpose of earning credits if there is no need or request for it. See Raso v. Moran, 551 F.Supp. 294, 298-299 (D.R.I. 1982) (although state statute permitting prisoners to donate blood in exchange for reductions of their sentences created a liberty interest, it was possible that inmates would not be able to give blood if there was no need for it).

Accordingly, the petition for a writ of habeas is hereby DENIED.

SO ORDERED THIS 20th day of ONT., 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

FILED

OCT 19 1995

LC

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JIMMY LEE DOBSON,)
)
 Petitioner,)
)
 vs.)
)
 RON WARD,)
)
 Respondent.)

No. 94-C-772-B

ENTERED ON DOCKET

DATE OCT 20 1995

ORDER

This is a proceeding on a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner, currently confined in the Oklahoma Department of Corrections (DOC), challenges his conviction for assault with intent to rape in Tulsa County District Court, Case No. CF-88-4726. Respondent has filed a Rule 5 response to which Petitioner has replied. As more fully set out below the Court concludes that this petition should be denied.

I. BACKGROUND

On July 5, 1989, Petitioner pled no contest to assault with intent to rape and on September 22, 1989, he received a deferred sentence of five years. Petitioner did not move to withdraw his guilty plea and file a direct appeal.

In February 1991, the state court accelerated Petitioner's sentence to five years in the custody of the DOC because Petitioner had failed to abide by the rules and conditions of his deferred sentence. Thereafter, Petitioner filed an application for post-conviction relief, alleging ineffective assistance of counsel,

insufficiency of the evidence, lack of jurisdiction, and the plea was not knowingly and voluntarily entered. The Tulsa County District Court denied relief and the Oklahoma Court of Criminal Appeals affirmed on the basis of a state procedural bar.

In the instant petition for a writ of habeas corpus, Petitioner alleges only that "[t]he evidence submitted is wholly insufficient to warrant conviction of assault with intent to rape." Respondent has raised the defense of procedural default.

II. ANALYSIS

Respondent concedes, and this Court finds, that Petitioner meets the exhaustion requirements under the law. The Court also finds that an evidentiary hearing is not necessary as the issues can be resolved on the basis of the record, see Townsend v. Sain, 372 U.S. 293, 318 (1963), overruled in part on other grounds, Keeney v. Tamayo-Reyes, 504 U.S. 1 (1992).

A. Procedural Bar

The alleged procedural default in this case results from Petitioner's failure to raise his claim in a timely directly appeal and his failure to provide the court sufficient reason for failing to do so.

The doctrine of procedural default prohibits a federal court from considering a specific habeas claim where the states highest court declined to reach the merits of that claim on independent and adequate state procedural grounds, unless a petitioner

"demonstrate[s] cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate[s] that failure to consider the claim[] will result in a fundamental miscarriage of justice." Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 2565 (1991); see also Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S. Ct. 1972 (1995); Gilbert v. Scott, 941 F.2d 1065, 1067-68 (10th Cir. 1991). "A state court finding of procedural default is independent if it is separate and distinct from federal law." Maes, 46 F.3d at 985. A finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Id. (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).

Applying these principles to the instant case, the Court concludes Petitioner's claim is barred by the procedural default doctrine. The state court's procedural bar as applied to Petitioner's claim was an "independent" state ground because "it was the exclusive basis for the state court's holding." Maes, 46 F.3d at 985. Additionally, the procedural bar was an "adequate" state ground because the Oklahoma Court of Criminal Appeals has consistently declined to review a claim which was not raised on direct appeal. Moore v. State, 809 P.2d 63, 64 (Okla. Crim. App.), cert. denied, 502 U.S. 913 (1991) (the doctrine of res judicata bars consideration in post-conviction proceedings of issues which have been or which could have been raised on direct appeal).

Because of his procedural default, this Court may not consider

Petitioner's claim unless he is able to show cause and prejudice for the default, or demonstrate that a fundamental miscarriage of justice would result if his claim is not considered. See Coleman, 111 S. Ct. at 2565. The cause standard requires a petitioner to "show that some objective factor external to the defense impeded . . . efforts to comply with the state procedural rules." Murray v. Carrier, 477 U.S. 478, 488 (1986). Examples of such external factors include the discovery of new evidence, a change in the law, and interference by state officials. Id. As for prejudice, a petitioner must show "'actual prejudice' resulting from the errors of which he complains." United States v. Frady, 456 U.S. 152, 168 (1982). A "fundamental miscarriage of justice" instead requires a petitioner to demonstrate that he is "actually innocent" of the crime of which he was convicted. McCleskey v. Zant, 499 U.S. 467, 494 (1991).

Petitioner attempts to show cause by alleging ineffective assistance of counsel. He argues that counsel erroneously advised him that he could not appeal his nolo contendere plea and that his counsel coerced him to plead nolo contendere. (Petitioner's reply, docket #9, at 2.)

An attorney has no absolute duty in every case to advise a defendant of his appeal rights or to file an appeal following a guilty plea conviction. Laycock v. New Mexico, 880 F.2d 1184, 1187-88 (10th Cir. 1989) (citing Marrow v. United States, 772 F.2d 525, 527 (9th Cir. 1985); Carey v. Laverette, 605 F.2d 745, 746 (4th Cir.) (per curiam) (there is "no constitutional requirement

that defendants must always be informed of their right to appeal following a guilty plea"), cert. denied, 444 U.S. 983 (1979)); see also Hardiman, 971 F.2d at 506; Castellanos v. United States, 26 F.3d 717 (7th Cir. 1994); Davis v. Wainwright, 462 F.2d 1354 (5th Cir. 1972). Only "[i]f a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right" does counsel have a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock, 880 F.2d at 1188; see also Shaw v. Cody, No. 94-6172, 1995 WL 20425, *2 (10th Cir. Jan. 20, 1995) (unpublished opinion); Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (counsel's failure to file a requested appellate brief, when he had not yet been relieved of his duties through a successful withdrawal, amounted to constitutionally ineffective assistance). "This duty arises when 'counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim.'" Hardiman, 971 F.2d at 506 (quoting Marrow v. United States, 772 F.2d 525, 529 (9th Cir. 1985)).

Petitioner does not allege that during the pertinent time period counsel knew or had reason to know that Petitioner believed his assistance had been constitutionally inadequate. As noted above, counsel's duty to inform his client of his limited right to appeal a guilty plea arises only when "counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." Hardiman, 971 F.2d at 506. Therefore, counsel had no duty to advise Petitioner of his right to appeal the

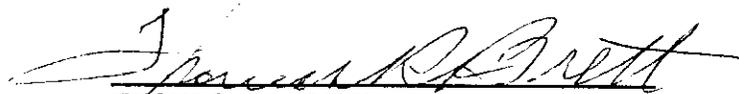
guilty plea absent any evidence demonstrating that counsel knew or should have known Petitioner believed his assistance was constitutionally inadequate.¹ Laycock, 880 F.2d at 1188.

Petitioner's only other means of gaining federal habeas review is a claim of actual innocence under the fundamental miscarriage of justice exception. Herrera v. Collins, 113 S.Ct. 853, 862 (1993); Sawyer v. Whitley, 112 S. Ct. 2514, 2519-20 (1992). Petitioner, however, does not claim that he is actually innocent of the crime at issue in this habeas action. Therefore, Petitioner's claim is procedurally barred.

III. CONCLUSION

After carefully reviewing the record in this case, the Court concludes that Petitioner cannot establish cause and prejudice, or a fundamental miscarriage of justice to excuse his procedural default. Accordingly, the petition for a writ of habeas corpus is hereby DENIED.

SO ORDERED THIS 30th day of Oct., 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

¹ Nor does Petitioner contend that he inquired about his appeal rights during the ten-day period following sentencing, and that counsel failed to file a direct appeal.

FILED
OCT 19 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

REGINALD KEITH LONG,)
)
) Petitioner,)
 vs.)
)
) RON CHAMPION,)
)
) Respondent.)

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 94-C-170-BU ✓

ENTERED ON DOCKET
DATE OCT 20 1995

ORDER

On February 24, 1994, Petitioner, Reginald Keith Long, filed a Petition for a Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254. As authorized by 28 U.S.C. § 636(b)(1)(B), this Court referred the matter to United States Magistrate Judge John L. Wagner for the purpose of submitting a report and recommendation. On May 17, 1995, Magistrate Judge Wagner issued a Report and Recommendation. In the Report and Recommendation, Magistrate Judge Wagner recommended the Petition for Writ of Habeas Corpus be dismissed in its entirety.

This matter now comes before the Court upon the timely objection of Petitioner to Magistrate Judge Wagner's Report and Recommendation. Pursuant to 28 U.S.C. § 636(b), the Court has conducted a de novo review of this matter. Having done so, the Court agrees with Magistrate Judge Wagner's findings that Petitioner is not entitled to federal habeas relief on the first, second, and third grounds for relief alleged in his Petition as errors occurring in state post-conviction proceedings are not sufficient to raise a federally cognizable issue as to the challenged state criminal conviction. Federal habeas relief is available only for errors of "the Constitution, laws, or treaties

of the United States." Estelle v. McGuire, 502 U.S. 62, 68 (1991). It is not available for errors of state law alone. Hardiman v. Reynolds, 971 F.2d 500, 505 n. 9 (10th Cir. 1992).

The Court also agrees with the findings of Magistrate Judge Wagner that the Oklahoma Court of Criminal Appeals relied on a state procedural default rule to bar review of grounds four, five, six, seven, eight, nine, ten, and eleven of Petitioner's Petition as an independent and adequate ground for its decision and that under Coleman v. Thompson, 501 U.S. 722, 749-750 (1991), federal habeas review of these claims would be barred unless Petitioner can show cause for the procedural default and actual prejudice or a fundamental miscarriage of justice. Grounds four, five, six, seven, eight, nine, ten, and eleven were raised in Petitioner's second application for post-conviction relief.¹ In finding the grounds of relief were not entitled to review on the merits, the Oklahoma Court of Criminal Appeals relied upon 22 O.S. § 1086 (1991).² The court found that Petitioner had failed to provide

¹In the Report and Recommendation, Magistrate Judge Wagner found that ground eight was also raised in the first application for post-conviction relief. The Court declines to adopt that finding. The record reveals that the allegations in ground eight were set forth in the second application for post-conviction relief.

²Section 1086 reads as follows:

All grounds for relief available to an applicant under this act must be raised in his original, supplemental or amended application. Any ground finally adjudicated or not so raised, or knowingly, voluntarily and intelligently waived in the proceeding that resulted in the conviction or sentence or in any other proceeding the applicant has taken

sufficient reasons concerning why the grounds for relief asserted in his second application for habeas relief were not asserted in prior proceedings. This Court concludes that the Oklahoma Court of Criminal Appeals finding of waiver under § 1086 was independent of federal law, as it was the sole basis for finding the grounds of relief barred. Maes v. Thomas, 46 F.3d 979, 985 (10th Cir.), cert. denied, 115 S.Ct. 1972 (1995) (state court finding of procedural default is independent if it is separate and distinct from federal law). The Court also finds that the finding of waiver was based upon an adequate state ground. The Oklahoma Court of Criminal Appeals has consistently declined to review claims not raised in a first application for post-conviction relief. Smith v. State, 878 P.2d 375 (Okla. Crim. App.), cert. denied, 115 S.Ct. 673 (1994). Johnson v. State, 823 P.2d 370 (Okla. Crim. App.), cert. denied, 504 U.S. 926 (1992). A state court finding of procedural default is an adequate state ground if it has been applied evenhandedly "'in the vast majority of cases.'" Maes, 46 F.3d at 986 (quoting Andrews v. Deland, 943 F.2d 1162, 1190 (10th Cir. 1991), cert. denied, 502 U.S. 1110 (1992)).³

to secure relief may not be the basis for a subsequent application, unless the court finds a ground for relief asserted which for sufficient reason was not asserted or was inadequately raised in the prior application.

³In his objection, Petitioner argues that the waiver in § 1086 is not adequate because it is not "strictly or regularly followed" by the Oklahoma Court of Criminal Appeals. Petitioner asserts that the Oklahoma Court of Criminal Appeals has reviewed the merits of claims which raise "fundamental error." The Court, however, finds Petitioner's arguments without merit. The "fundamental error"

Applying the cause and prejudice standard to the facts of this case, the Court finds that Petitioner has failed to establish that the procedural default of grounds four, five, six, seven, eight, nine, ten and eleven resulted from some objective factor external to his defense. Murray v. Carrier, 477 U.S. 478, 488 (1986). Since Petitioner had no sixth amendment right to counsel during the state post-conviction proceedings, he bears the burden of his failure to raise his claims in his first application for post-conviction relief in compliance with 22 O.S. § 1086. Petitioner's pro se status cannot constitute sufficient cause for his failure to raise his claims in his first application for post-conviction relief. McCoy v. Newsome, 953 F.2d 1252, 1258-59 (11th Cir.) (holding that petitioner's degree of education and lack of legal knowledge was not an external impediment to his defense in state courts and did not provide cause for procedural default in state court on issues which he then sought to raise in federal habeas corpus petition, where he did subsequently assert them in other proceedings while still proceeding pro se), cert. denied, 112 S.Ct. 2283 (1992). Because Petitioner has failed to show cause for his procedural default, this Court need not consider whether Petitioner can show prejudice.

Petitioner's only other means of gaining federal habeas review of grounds four, five, six, seven, eight, nine, ten and eleven is

exception is limited to the direct review setting and does not apply to claims raised for the first time in state post-conviction proceedings. Brecheen v. Reynolds, 41 F.3d 1343, 1354 n. 10 (10th Cir. 1994).

a claim of actual innocence. Sawyer v. Whitley, 112 S.Ct. 2514, 2519-20 (1992). However, in his section 2254 petition, Petitioner does not claim actual innocence. Accordingly, this Court must conclude that Petitioner's federal habeas claims in grounds four, five, six, seven, eight, nine, ten and eleven are procedurally barred.

In the Report and Recommendation, Magistrate Judge Wagner also found that grounds twelve, thirteen and fourteen were procedurally barred.⁴ This Court disagrees. In Brecheen v. Reynolds, 41 F.3d 1343, 1363-64 (10th Cir. 1994), the Tenth Circuit determined that ineffective assistance of counsel claims brought for the first time in post-conviction proceedings are not procedurally barred. The Tenth Circuit concluded that the Oklahoma state rule barring review of ineffective assistance of counsel claims was not an "adequate" state ground. The Court therefore must address the merits of those grounds.

In ground twelve of his Petition, Petitioner has alleged that his counsel was ineffective by failing to advise him of the true consequences of his plea. Petitioner contends that his counsel failed to advise him that a sentence of life without parole could not be discharged in forty-five years. Petitioner contends that he believed that such a sentence could be discharged in forty-five

⁴Magistrate Judge Wagner found that grounds thirteen and fourteen were raised in the first application for post-conviction relief and that ground twelve was raised in the second application for post-conviction relief. The record, however, reflects that the allegations in ground twelve were set forth in the first application. The Court therefore declines to adopt the finding that ground twelve was raised in the second application.

years and the trial court did not dispel any such belief by stating that the sentence could not be paroled.

The Court finds that Petitioner has failed to allege sufficient facts to show that his counsel was ineffective. While Petitioner claims that he believed he could discharge his sentence within forty-five years, he does not allege in his Petition that he told his counsel that he believed this and he did not state this fact at the plea hearing. Moreover, Petitioner does not allege that his counsel informed him that he could discharge a life imprisonment sentence without parole in forty-five years. Furthermore, the transcript of the plea hearing reveals that Petitioner and his counsel had long discussions regarding his plea of guilty and the April 23, 1991 letter sent by Petitioner's counsel indicates that Petitioner and his counsel discussed all the choices and possibilities of a life sentence, a life sentence without parole and the death penalty.

In ground thirteen of his Petition, Petitioner has alleged that his counsel was ineffective because he did not attempt to suppress his confession. The record, however, reflects that Petitioner's counsel did file a motion to suppress in regard to Petitioner's statements. It also reflects that counsel filed a motion to suppress all of the evidence obtained from Petitioner's arrest. The Court therefore concludes that Petitioner is not entitled to relief under ground thirteen of his Petition.

In ground fourteen of the Petition, Petitioner has alleged that he received ineffective assistance of counsel because his

trial counsel failed to file a direct appeal within the ten (10) day statutory period. The standard governing Petitioner's claim of ineffective assistance of counsel is well established. Under Strickland v. Washington, 466 U.S. 668 (1984), to establish a claim for ineffective assistance of counsel, a petitioner must show that his counsel's performance was deficient and that the deficient performance prejudiced his defense. Id.; Osborn v. Shillinger, 997 F.2d 1324, 1328 (10th Cir. 1993). A federal habeas court need not consider whether a petitioner established the second prong of the Strickland test if it finds that counsel was constitutionally inadequate in failing to perfect an appeal--i.e., if the criminal defendant asked his lawyer to file an appeal and the lawyer failed to do so. See, Abels v. Kaiser, 913 F.2d 821, 823 (10th Cir. 1990) (holding that when a court has found counsel constitutionally inadequate because counsel failed to properly perfect an appeal, it need not consider the merits of arguments that the defendant might have made on appeal).

After a guilty plea, "[a]n attorney has no absolute duty in every case to advise a defendant of his limited right to appeal." Hardiman, 971 F.2d at 506. However, "[i]f a claim of error is made on constitutional grounds, which could result in setting aside the plea, or if the defendant inquires about an appeal right," counsel has a duty to inform the defendant of his limited right to appeal a guilty plea. Laycock v. New Mexico, 880 F.2d 1184, 1188 (10th Cir. 1989); see also, Briggs v. Carr, No. 94-5161, 1995 WL 250796, *4 (10th Cir. May 1, 1995) (unpublished opinion). "This duty arises

when 'counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim.'" Hardiman, 971 F.2d at 506 (quoting Marrow v. United States, 772 F.2d 525, 529 (9th Cir. 1985)).

While Petitioner's constitutional right to counsel extended to the ten-day period following sentencing, see Baker v. Kaiser, 929 F.2d 1495, 1499 (10th Cir. 1991); Randall v. State, 861 P.2d 314, 316 (Okla. Crim. App. 1993) (where the Oklahoma Court of Criminal Appeals held that a hearing on an application to withdraw a guilty plea is a critical stage which invokes a defendant's constitutional right to counsel), there is no indication in the record that Petitioner attempted to contact his retained counsel or wanted his assistance during the ten-day period following sentencing. Cf. Baker, 929 F.2d at 1499. Petitioner contends that he showed his desire to withdraw his guilty plea by failing to testify against his co-defendant as promised in the plea agreement. Petitioner has not established that his refusal to testify occurred within the ten-day statutory period and the record does not reflect that fact.

Petitioner also argues in his Petition that his counsel convinced him that she would file an appeal for him and that he did not find out that an appeal had not been filed until he contacted the Tulsa Public Defender's office. Petitioner, however, does not provide any evidence that Petitioner had requested counsel to file an appeal within the ten-day period. The record reflects that Petitioner sent a letter to his retained counsel over a month after his sentencing, however, such letter was outside the ten-day

statutory period. Furthermore, the April 23, 1995 letter from Petitioner's counsel in response to Petitioner's letter shows that Petitioner had indicated to his counsel in their last conversation that he did not want to appeal his guilty plea. The Court therefore concludes that Petitioner's counsel was not ineffective.

The constitutional claim of error asserted by Petitioner is that his retained counsel provided ineffective assistance of counsel. Petitioner does not, however, allege that during the pertinent time period counsel knew or had reason to know that Petitioner believed his assistance had been constitutionally inadequate. As noted above, counsel's duty to inform his client of his right to appeal a guilty plea arises only when "counsel either knows or should have learned of his client's claim or of the relevant facts giving rise to that claim." Hardiman, 971 F.2d at 506. Petitioner's counsel had no duty to advise Petitioner of his right to appeal the guilty plea absent evidence demonstrating that counsel knew or should have known Petitioner believed his assistance was constitutionally inadequate. Laycock, 880 F.2d at 1188. Therefore, Petitioner's counsel did not provide constitutionally ineffective assistance in failing to inform or advise Petitioner of the right to appeal.

While counsel had a duty to inform Petitioner of his limited rights to appeal his guilty plea if Petitioner inquired about his appeal rights, Petitioner, as stated above, has not shown that he inquired about his appeal rights within the ten-day statutory period nor has he shown that he instructed his counsel to appeal within the ten-day statutory period. Accordingly, counsel had no duty to inform Petitioner of his limited rights to appeal his

guilty plea.

Based upon the foregoing, the Report and Recommendation issued by Magistrate Judge Wagner (Docket Entry #16) is AFFIRMED in part and DENIED in part. The Petition for Writ of Habeas Corpus (Docket Entry #1) is DENIED.

ENTERED this 19 day of October, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 10 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

OTIS W. CRANE,
SS# 445-54-2854

Plaintiff,

v.

NO. 94-C-651-B

SHIRLEY S. CHATER, Commissioner,¹
Social Security Administration

Defendant.

ENTERED ON DOCKET
DATE OCT 19 1995

REPORT AND RECOMMENDATION

Plaintiff, Otis W. Crane, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.²

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this report continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Plaintiff's initial application for benefits was filed February 20, 1990 and denied June 4, 1990. No further appeal was taken from that application and Plaintiff does not challenge the determination that there was no good cause shown to reopen. The current application for benefits was filed August 20, 1991 and was denied February 10, 1992. The denial was affirmed on reconsideration, September 14, 1992. A hearing before an Administrative Law Judge ("ALJ") was held February 24, 1993. By decision dated October 5, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on May 2, 1994. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence and that the ALJ failed to perform the correct analysis. Plaintiff asserts two specific complaints: (1) that the ALJ failed to consider the limiting effects of Plaintiff's obesity in combination with his other impairments; and (2) that the ALJ failed to point out specific evidence that Plaintiff retains the RFC to perform the walking and standing requirements of light work.

The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the relevant facts of this case and has properly outlined the required sequential analysis. The Court therefore incorporates this information into this recommendation as the duplication of this effort would serve no useful purpose.

Plaintiff claims that the ALJ failed to properly consider his obesity in combination with his other impairments. At page 5 of his brief Plaintiff asserts, "The ALJ stated that, since Mr. Crane's weight never approached [the listing level], *discussion of the relationship of his weight to other medical problems was moot.* (R. at 27)." [emphasis in original]. The language quoted from Plaintiff's brief is essentially the keystone of his argument that the decision should be reversed. It is also an outright misstatement of the ALJ's analysis which goes beyond the "gloss" permitted by the bounds of zealous advocacy.

The statement Plaintiff refers to was made in the context of discussing the requirements of Listing 9.09 which addresses the criteria by which obesity is found to be disabling per se, the ALJ stated, "Because claimant's weight does not equal the threshold requirements, *discussion of the other requirements of the listing is moot.*" [R. 27] [emphasis supplied]. It is well-settled that a claimant is required to meet **all** the specified medical criteria for a listing to apply. See *Sullivan v. Zebley*, 493 U.S. 521, 530, 110 S.Ct. 885, 891, 107 L.Ed.2d 967 (1990). The ALJ is correct that since the Plaintiff's weight did not meet the listing criteria, the other criteria of that listing are not relevant.

Plaintiff asserts that the finding that he retains the residual functional capacity to perform light work is not supported by substantial evidence. In particular, Plaintiff points to the findings of consultive examiner, Dr. Dandridge, who concluded that Plaintiff could only walk or stand for 10-30 minutes at a time [R. 477]. Dr. Dandridge noted the following medical findings support his assessment: "Physical Exam -- Medical Records. Residuals of painful restricted motion in right knee and ankle." [R. 478]. The ALJ based his opinion that plaintiff was "not markedly limited in his ability to walk and stand" [R. 25] on the absence of x-ray evidence to support a finding of gross anatomical deformity of the hip or knee, and the lack of objective verification of limited range of motion. X-rays of the right knee and ankle taken April 13, 1992 reveal mild degenerative change in the knee and only "some" degenerative change in the ankle [R. 336-7]. Further, throughout Plaintiff's records there are indications that he has resisted use of his knee, despite his proven ability to do so, and has otherwise exaggerated his problems or embellished his history [R. 301-2, 466-470]. Through numerous examples of inconsistencies in the record, the ALJ demonstrated Plaintiff not to be credible, a finding not challenged by

Plaintiff [R. 39-40]. In so far as Dr. Dandridge's opinion has taken into account Plaintiff's subjective complaints of pain, the Court finds that the ALJ was amply justified in disregarding it and concluding that Plaintiff could perform light work. However, the record unquestionably supports a finding that Plaintiff could perform unskilled sedentary work which the vocational expert testified existed in the economy [R. 45, 103-105]. Accordingly, even if the finding that Plaintiff can perform light work is infirm, the conclusion that he is not disabled is supported by substantial evidence.

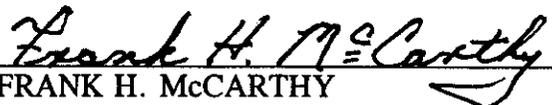
The record unquestionably supports a finding that Plaintiff retains the RFC for sedentary work [R. 477-8]. In his decision the ALJ correctly noted that application of the medical-vocational guidelines, 20 C.F.R. Pt. 404, Subpt. P, App. 2, Table No. 1, Rule 201.27 directs a finding that Plaintiff is not disabled. This, coupled with the vocational expert's testimony constitutes substantial evidence to support the finding that Plaintiff is not disabled.

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the undersigned United States Magistrate Judge recommends that the decision of the Secretary finding Plaintiff not disabled be AFFIRMED.

In accordance with 28 U.S.C. § 636(b) and Fed.R.Civ.P. 72(b), any objections to this Report and Recommendation must be filed with the Clerk of the Court within ten (10) days of the receipt of this Report. Failure to file objections within the time specified waives the

right to appeal from a judgment of the district court based upon the findings and recommendations of the magistrate. *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991).

DATED THIS 18th day of OCT., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WALTER F. OWENS aka WALTER)
 FERRIL aka WALTER OWENS; LESLIE)
 OWENS aka LESLIE D. OWENS;)
 TERRY GARTSIDE INVESTMENTS,)
 INC.; DBG COMPANY, INC.; DANDI)
 CONSTRUCTION CO., INC.; CITY OF)
 SAND SPRINGS, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
 Defendants.)

OCT 18 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE 10-19-95

Civil Case No. 95-C 698BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day of Oct,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant
District Attorney, Tulsa County, Oklahoma; and the Defendants, WALTER F. OWENS aka
WALTER FERRIL OWENS aka WALTER OWENS; LESLIE OWENS aka LESLIE D.
OWENS; TERRY GARTSIDE INVESTMENTS, INC.; DBG COMPANY, INC.; DANDI
CONSTRUCTION CO., INC.; and CITY OF SAND SPRINGS, Oklahoma, appear not, but
make default.

The Court being fully advised and having examined the court file finds that the Defendant WALTER F. OWENS aka WALTER FERRIL OWENS aka WALTER OWENS, waived service of Summons on August 3, 1995; that the Defendant, LESLIE OWENS aka LESLIE D. OWENS, waived service of Summons on August 3, 1995; that the Defendant, TERRY GARTSIDE INVESTMENTS, INC., waived service of Summons on August 1, 1995; that the Defendant, DBG COMPANY, INC., waived service of Summons on July 31, 1995; that the Defendant, DANDI CONSTRUCTION CO., INC., waived service of Summons on July 27, 1995; and that the Defendant, CITY OF SAND SPRINGS, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on July 27, 1995.

The Court further finds that the Defendant, WALTER F. OWENS aka WALTER FERRIL OWENS aka WALTER OWENS will hereinafter be referred to as ("WALTER F. OWENS"); and the Defendant, LESLIE OWENS aka LESLIE D. OWENS, will hereinafter be referred to as ("LESLIE OWENS"). WALTER F. OWENS and LESLIE OWENS are husband and wife.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on August 14, 1995; and that the Defendants, WALTER F. OWENS, LESLIE OWENS, TERRY GARTSIDE INVESTMENTS, INC., DBG COMPANY, INC., DANDI CONSTRUCTION CO., INC., and CITY OF SAND SPRINGS, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Six (6), Block Two (2), PRATTWOOD ESTATES 3RD, an Addition to the City of Sand Springs, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on January 30, 1986, Michael L. Penix and Lisa G. Penix, executed and delivered to MERCURY MORTGAGE CO., INC. their mortgage note in the amount of \$78,213.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Michael L. Penix and Lisa G. Penix, husband and wife, executed and delivered to MERCURY MORTGAGE CO., INC. a mortgage dated January 30, 1986, covering the above-described property. Said mortgage was recorded on February 7, 1986, in Book 4923, Page 1724, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 14, 1990, MERCURY MORTGAGE CO., INC. assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 14, 1990, in Book 5236, Page 944, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, WALTER F. OWENS and LESLIE OWENS, currently hold the record title to the subject property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on February 9, 1988, the Defendant, WALTER F. OWENS, filed his petition for Chapter 7 relief in the United States Bankruptcy Court for

the Northern District of Oklahoma, case number 88-278. This case was discharged on May 27, 1988 and subsequently closed on September 29, 1988.

The Court further finds that on January 22, 1990, the Defendants, WALTER F. OWENS and LESLIE OWENS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on March 5, 1991.

The Court further finds that the Defendants, WALTER F. OWENS and LESLIE OWENS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, WALTER F. OWENS and LESLIE OWENS, are indebted to the Plaintiff in the principal sum of \$127,580.51, plus interest at the rate of 10.5 percent per annum from July 19, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$21.00 which became a lien on the property as of July 2, 1990; a lien in the amount of \$15.00 which became a lien as of June 20, 1991; a lien in the amount of \$52.00 which became a lien as of June 26, 1992; a lien in the amount of \$50.00 which became a lien as of June 25, 1993; and a lien in the amount of \$50.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, WALTER F. OWENS; LESLIE OWENS aka LESLIE D. OWENS; TERRY GARTSIDE INVESTMENTS, INC.; DBG COMPANY, INC.; DANDI CONSTRUCTION CO., INC.; and CITY OF SAND SPRINGS, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, WALTER F. OWENS and LESLIE OWENS, in the principal sum of \$127,580.51, plus interest at the rate of 10.5 percent per annum from July 19, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment

in the amount of \$188.00, plus costs and interest, for personal property taxes for the years 1989-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, WALTER F. OWENS, LESLIE OWENS, TERRY GARTSIDE INVESTMENTS, INC., DBG COMPANY, INC., DANDI CONSTRUCTION CO., INC., CITY OF SAND SPRINGS, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, WALTER F. OWENS and LESLIE OWENS, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$188.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

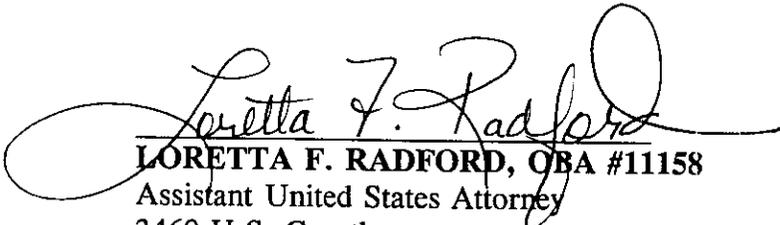
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

***s/* MICHAEL BURRAGE**

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 698BU

LFR/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

TERRY EUGENE WINCHESTER,)
)
 Plaintiff,)
)
 vs.)
)
 ED WALKER, OTTAWA COUNTY)
 JAIL,)
)
 Defendants.)

No. 95-C-719-K

ENTERED ON DOCKET
DATE ~~OCT 10 1995~~

FILED

OCT 18 1995

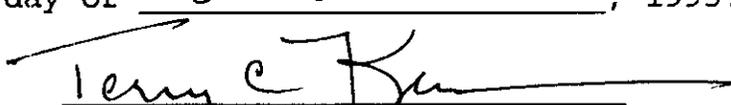
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

On August 10, 1995, the Clerk of the Court notified Plaintiff that his motion for leave to proceed in forma pauperis was insufficient because the financial certificate by an authorized official of the penal institution was not filled out. On September 1, 1995, Plaintiff notified the Court of his address change and stated that he would send a second motion for leave to proceed in forma pauperis as soon as possible. As of the date of this order, Plaintiff has yet to submit a properly filled out financial certificate by an authorized official of the penal institution or the requisite filing fee.

Accordingly, Plaintiff's motion for leave to proceed in forma pauperis (docket #2) is **denied** and the instant action is hereby **dismissed** without prejudice. The Clerk shall **return** to Plaintiff the extra copies of the complaint and all summons and service papers.

SO ORDERED THIS 17 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 18 1995

sa

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CHARLES KENNEDY,)
)
Plaintiff,)
)
vs.)
)
DONNA E. SHALALA, Secretary)
of HHS,)
)
Defendant.)

No. 93-C-187-E ✓

ENTERED ON DOCKET

DATE 10-19-95

O R D E R

Before the Court is Plaintiff's Application for Attorney Fees and Costs Pursuant to the Equal Access to Justice Act. On January 20, 1995, the Court remanded Plaintiff's appeal of the denial of disability benefits pursuant to 42 U.S.C. §405(g) for further findings concerning the extent of Plaintiff's hand impairment and any resulting impact on Plaintiff's employment potential. Plaintiff now seeks attorney's fees and costs for his appeal under the Equal Access to Justice Act, 28 U.S.C. §2412(d).

The Secretary of Health and Human Services (the "Secretary") objects to Plaintiff's application because the denial of benefits was substantially justified, and in the alternative, Plaintiff is not entitled to his requested cost of living increase based on the 1995 Consumer Price Index¹ or costs for travel or postage.

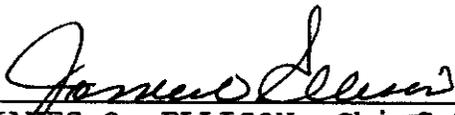
¹ Plaintiff argues that the appropriate cost of living increase should be based on the January 1, 1995 Consumer Price Index of 150.3 as the order remanding the case was entered on January 20, 1995. The Secretary contends that Plaintiff's fees should be calculated using the pre-January 1, 1995 CPI of 145.1 because the bulk of Plaintiff's attorney's work in filing and briefing the appeal occurred prior to January 1, 1995.

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The Court finds that Plaintiff is entitled to attorney's fees and costs for his appeal as the Secretary has failed to establish that she was substantially justified in denying benefits based on the record in the administrative proceedings. Weakley v. Bowen, 803 F.2d 575, 577-78 (10th Cir. 1986). The Court also finds that Plaintiff is not entitled to costs for travel time (5 hours) or postage (\$24.90). Id. at 579.

Based on the above, the Court concludes that Plaintiff is entitled to attorney's fees based on a cost of living increase of $(145.1/93.4) \times \$75.00/\text{hour} \times 17.9$ hours (pre-January 1995 hours) plus a cost of living increase of $(150.3/93.4) \times \$75.00/\text{hour} \times 6.6$ hours (post-January 1995 hours minus five hours travel time), or \$2,882.18, as well as costs of \$29.50, for a total of \$2,911.68.

ORDERED this 18th day of October, 1995.



JAMES O. ELLISON, ~~Chief~~ Judge
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 18 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ANNETTE A. BLANKE, individually,)
and ANNETTE A. BLANKE, as mother)
and guardian of JESSE BLANKE)
and KRISTA BLANKE, minors,)
Plaintiffs,)

vs.)

Case No. 94-C-1165-BU ✓

BILLY E. ALEXANDER,)
individually, BUILDERS)
TRANSPORT, INC., a foreign)
corporation, and PLANET)
INSURANCE COMPANY a/k/a)
RELIANCE NATIONAL INDEMNITY)
COMPANY, a foreign corporation,)
Defendants.)

ENTERED ON DOCKET

DATE 10-19-95

ORDER

This matter comes before the Court upon Plaintiffs' Motion for Costs and Prejudgment and Post-Judgment Interest. Defendants have responded to the motion in regard to costs but not in regard to prejudgment and post-judgment interest.

As to Plaintiffs' motion for costs, the Court declines to address the motion. Pursuant to Fed.R.Civ.P. 54(d) and Local Rule 54.1, costs are to be taxed by the Clerk of the Court. Taxation of costs by the Clerk is subject to judicial review by the Clerk only after costs have been taxed and a motion for review has been filed. The Clerk has not yet had an opportunity to address the issue of costs. Therefore, the Court denies Defendants' motion at this time.

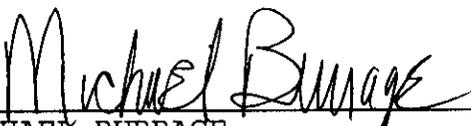
In regard to Plaintiffs' motion for prejudgment and post-judgment interest, the Court finds that Plaintiffs' motion should

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be granted. Plaintiffs, as prevailing parties in this action, are entitled to prejudgment interest under Okla. Stat. tit. 12, § 727(A)(2) and post-judgment interest under 28 U.S.C. § 1961(a).

Accordingly, Plaintiffs' Motion for Costs (Docket Entry #83) is DENIED. Plaintiffs' Motion for Prejudgment and Post-Judgment Interest (Docket Entry #83) is GRANTED. Plaintiffs are AWARDED prejudgment interest in the amount of \$28,929.69 and post-judgment interest in the amount of \$75.00 per day from September 25, 1995, the date of entry of the judgment, until the date of the payment of the judgment in full.

ENTERED this 16th day of October, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 WALTER F. OWENS aka WALTER)
 FERRIL aka WALTER OWENS; LESLIE)
 OWENS aka LESLIE D. OWENS;)
 TERRY GARTSIDE INVESTMENTS,)
 INC.; DBG COMPANY, INC.; DANDI)
 CONSTRUCTION CO., INC.; CITY OF)
 SAND SPRINGS, Oklahoma;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
 Defendants.)

OCT 18 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 10-19-95

Civil Case No. 95-C 698BU

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 18 day of Oct,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant
District Attorney, Tulsa County, Oklahoma; and the Defendants, WALTER F. OWENS aka
WALTER FERRIL OWENS aka WALTER OWENS; LESLIE OWENS aka LESLIE D.
OWENS; TERRY GARTSIDE INVESTMENTS, INC.; DBG COMPANY, INC.; DANDI
CONSTRUCTION CO., INC.; and CITY OF SAND SPRINGS, Oklahoma, appear not, but
make default.

The Court being fully advised and having examined the court file finds that the Defendant WALTER F. OWENS aka WALTER FERRIL OWENS aka WALTER OWENS, waived service of Summons on August 3, 1995; that the Defendant, LESLIE OWENS aka LESLIE D. OWENS, waived service of Summons on August 3, 1995; that the Defendant, TERRY GARTSIDE INVESTMENTS, INC., waived service of Summons on August 1, 1995; that the Defendant, DBG COMPANY, INC., waived service of Summons on July 31, 1995; that the Defendant, DANDI CONSTRUCTION CO., INC., waived service of Summons on July 27, 1995; and that the Defendant, CITY OF SAND SPRINGS, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on July 27, 1995.

The Court further finds that the Defendant, WALTER F. OWENS aka WALTER FERRIL OWENS aka WALTER OWENS will hereinafter be referred to as ("WALTER F. OWENS"); and the Defendant, LESLIE OWENS aka LESLIE D. OWENS, will hereinafter be referred to as ("LESLIE OWENS"). WALTER F. OWENS and LESLIE OWENS are husband and wife.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on August 14, 1995; and that the Defendants, WALTER F. OWENS, LESLIE OWENS, TERRY GARTSIDE INVESTMENTS, INC., DBG COMPANY, INC., DANDI CONSTRUCTION CO., INC., and CITY OF SAND SPRINGS, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Six (6), Block Two (2), PRATTWOOD ESTATES 3RD, an Addition to the City of Sand Springs, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on January 30, 1986, Michael L. Penix and Lisa G. Penix, executed and delivered to MERCURY MORTGAGE CO., INC. their mortgage note in the amount of \$78,213.00, payable in monthly installments, with interest thereon at the rate of ten and one-half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, Michael L. Penix and Lisa G. Penix, husband and wife, executed and delivered to MERCURY MORTGAGE CO., INC. a mortgage dated January 30, 1986, covering the above-described property. Said mortgage was recorded on February 7, 1986, in Book 4923, Page 1724, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 14, 1990, MERCURY MORTGAGE CO., INC. assigned the above-described mortgage note and mortgage to THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on February 14, 1990, in Book 5236, Page 944, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, WALTER F. OWENS and LESLIE OWENS, currently hold the record title to the subject property via mesne conveyances and are the current assumptors of the subject indebtedness.

The Court further finds that on February 9, 1988, the Defendant, WALTER F. OWENS, filed his petition for Chapter 7 relief in the United States Bankruptcy Court for

the Northern District of Oklahoma, case number 88-278. This case was discharged on May 27, 1988 and subsequently closed on September 29, 1988.

The Court further finds that on January 22, 1990, the Defendants, WALTER F. OWENS and LESLIE OWENS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on March 5, 1991.

The Court further finds that the Defendants, WALTER F. OWENS and LESLIE OWENS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, WALTER F. OWENS and LESLIE OWENS, are indebted to the Plaintiff in the principal sum of \$127,580.51, plus interest at the rate of 10.5 percent per annum from July 19, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$21.00 which became a lien on the property as of July 2, 1990; a lien in the amount of \$15.00 which became a lien as of June 20, 1991; a lien in the amount of \$52.00 which became a lien as of June 26, 1992; a lien in the amount of \$50.00 which became a lien as of June 25, 1993; and a lien in the amount of \$50.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, WALTER F. OWENS; LESLIE OWENS aka LESLIE D. OWENS; TERRY GARTSIDE INVESTMENTS, INC.; DBG COMPANY, INC.; DANDI CONSTRUCTION CO., INC.; and CITY OF SAND SPRINGS, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, WALTER F. OWENS and LESLIE OWENS, in the principal sum of \$127,580.51, plus interest at the rate of 10.5 percent per annum from July 19, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment

in the amount of \$188.00, plus costs and interest, for personal property taxes for the years 1989-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, WALTER F. OWENS, LESLIE OWENS, TERRY GARTSIDE INVESTMENTS, INC., DBG COMPANY, INC., DANDI CONSTRUCTION CO., INC., CITY OF SAND SPRINGS, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, WALTER F. OWENS and LESLIE OWENS, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$188.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

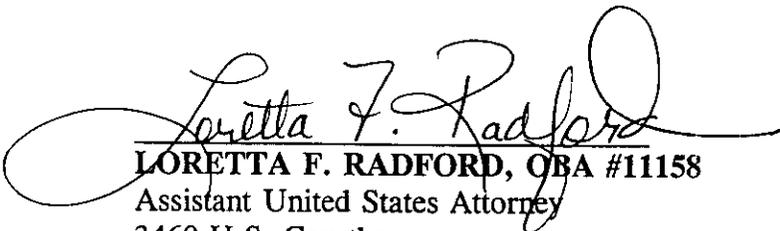
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

/s/ MICHAEL BURRAGE

UNITED STATES DISTRICT JUDGE

APPROVED:
STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463


DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 698BU

LFR/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

PAUL E. HOCKETT,)
)
 Plaintiff,)
)
 v.)
)
 SUN COMPANY, INC. (R&M);)
 and SUN COMPANY, INC.,)
 RETIREMENT PLAN;)
)
 Defendants.)

Case No. 92-C-437-H

ENTERED ON DOCKET

DATE OCT 19 1995

O R D E R

This action was tried to the Court on June 28, July 19, and July 20, 1995, and is an action by Paul Hockett against Sun Company, Inc. (R&M) and the Sun Company, Inc., Retirement Plan ("SCIRP") for violation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 et seq., hereinafter "ERISA".

Mr. Hockett claims that Defendant breached its fiduciary duties under ERISA by allegedly failing to inform him prior to his retirement of consideration by responsible officials of R&M and R&M's parent company, Sun, Inc., of an amendment to an employee pension benefit plan which, if adopted, would have provided him with a significantly more lucrative retirement package. He alleges that had he known of the alleged consideration before his retirement he would not have retired when he did on July 1, 1991. Mr. Hockett also claims that Defendants violated ERISA by failing to pay him retirement benefits made available to other employees as a result of the amendment.

135

Upon consideration of the evidence presented and arguments of counsel concerning the relevant issues, the Court adopts the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The Plaintiff, Paul E. Hockett, is a citizen of the State of Oklahoma. He was born on July 23, 1935.
2. R&M was a wholly-owned subsidiary of Sun Company, Inc. ("Sun, Inc.") during Hockett's employment with R&M.
3. Until October 31, 1991, Mr. Hockett managed R&M's credit card center, supervising 150 to 444 credit card center employees. Hockett Test. at 9-10.
4. Mr. Hockett had twenty-five years of experience in managing credit card operations. Hockett Dep. at 23.
5. During Mr. Hockett's employment with R&M, Sun, Inc. maintained a defined employee pension benefit plan, the Sun Company, Inc. Retirement Plan ("SCIRP"), for the purpose of providing pension and welfare benefits to certain employees of Sun, Inc. and R&M, including Mr. Hockett, and employees of other subsidiaries of Sun, Inc.
6. William Rutherford was Sun, Inc.'s Vice President of Human Resources and Administration. As such, he was a fiduciary of SCIRP. In addition, Mr. Rutherford's position vested in him broad discretionary authority over the design, administration, and management of all of Sun, Inc.'s benefit plans and programs. Anderman Test. at 14, 27-28, 36-40, 43, 57-59; Rutherford Dep. at

50, 55.

7. In July, 1989, Peter Waitneight, Vice President of Finance for R&M, became Mr. Hockett's supervisor. In this capacity, Mr. Waitneight supervised and evaluated Mr. Hockett's work and determined his compensation.

8. From 1989 until the end of Mr. Hockett's employment, Mr. Waitneight conducted two performance appraisals of his work. The first appraisal pertained to the period between June 1989 and April 27, 1990. The second review evaluated Mr. Hockett's performance from May 1990 through May 27, 1991. In both appraisals, Mr. Waitneight rated Mr. Hockett's performance as accomplished.

9. In April 1990, Mr. Hockett asked Mr. Waitneight about the possibility of receiving a "package" should he retire at age 55. Mr. Waitneight was not encouraging. He asked Mr. Hockett if he would leave if he did not get the package. Mr. Hockett responded that he could not afford to leave without a package. Mr. Waitneight then told him that he would look into it, but that "if he had to give [Mr. Hockett] a two-word answer right then, it would be 'not likely.'" Hockett Test. at 15-16, 31-32.

10. The term "package" meant severance pay, bonus pay, and other benefits.

11. Mr. Waitneight did inquire with the R&M Human Resources department concerning the availability of a "package" and was told that R&M President David Knoll had established a policy of granting special packages only upon the elimination of a position. Waitneight Dep. at 40; Hockett Test. at 87.

12. Mr. Waitneight considered Mr. Hockett's position too important to eliminate. Waitneight Dep. at 56.

13. Applying a new "targeted salary index," Mr. Waitneight determined that Mr. Hockett was not entitled to a merit raise in the 1991-92 Salary Administration Program. Mr. Hockett protested this decision to Mr. Waitneight, asserting that Mr. Waitneight had misapplied the company guidelines. After reconsidering his decision, Mr. Waitneight informed Mr. Hockett on June 3, 1991 that he had not changed his mind and would deny Mr. Hockett a merit raise. Mr. Hockett then threatened to retire. Mr. Waitneight checked his calculations with the R&M Human Resources department and informed Mr. Hockett on June 7 that his denial of Mr. Hockett's merit raise would stand. Mr. Hockett then asked Mr. Waitneight to accept his request for early retirement effective July 1, 1991. Hockett Test. at 21-22, 26-27, 30.

14. Due to significant economic losses in the last quarter of 1990 and the first quarter of 1991, Sun, Inc. began considering strategies to effect a downsizing or reduction in its work force in the Spring of 1991. Anderman Test. at 59-61.

15. On May 21, 1991, Mitchell Anderman sent a confidential memo to Charles Fuges identifying the issues and implications of a "Voluntary vs. Involuntary Termination Program." Mr. Anderman discussed what Sun was going to need to provide in order to offer an early retirement package that would be attractive to Sun R&M employees. He advised that, based on previously collected competitive data, most companies provide either a 3/3 or 5/5

pension enhancement as well as severance payments. Mr. Anderman opined that "in today's depressed job market [the severance payments] would be essential to achieve desired utilization." Pl.'s Ex. 12; Anderman Test. at 81-83.

16. On May 30, 1991, Alfred Little sent a memo to Pat Coggins and David Knoll commenting on the "good discussion on Friday, May 24, regarding the question whether to do a voluntary/involuntary termination package" and listing what Mr. Little perceived as the "advantages of a voluntary" plan. Pl.'s Ex. 13.

17. On June 3, 1991, Mr. Fuges sent a confidential memo to Mr. Little "per [their] voice mail discussion" setting forth Sun's "Potential Strategy" regarding early retirement packages. In writing the memo, Mr. Fuges consulted with Mr. Anderman in Corporate Benefits and with the legal department. The memo stated as follows:

CONFIDENTIAL

POTENTIAL STRATEGY

Definition

- Shut down current severance package and pension enhancements as of July 2, 1991 as advertised
- For those currently identified to lose job, provide choice
 - Involuntary terminate now and take current enhancements/package; bring back on contract if necessary

or

- Allow them to stay on in productive position with understanding that after study and business decisions are reached in several months, their disposition will be determined and they would receive any pension enhancements/severance program

for which they are eligible in place at time of their termination.

- Any new pension enhancements/severance package would be developed in response to the business decisions made over the next several months and would be available in the fall/winter.
- VP's would agree not to involuntarily terminate employees for other than cause, until business decisions are made and supporting outplacement provisions are in place.

Legal Aspects

- Strategy is legally defensible
 - Need appropriate employee notification
 - Any new out placement strategy needs to be developed after July 1, 1991, to diffuse potential claims by employees involuntarily terminated on or before July 1, 1991, that company knew of new program provisions but did not share it with them. (Significant if new outplacement program(s) is of greater value to employees who left under pre-July 2, 1991 outplacement and pension enhancement programs.)
- Employee legal suits regarding previous point would be expected regardless of approach. However, specific actions on Company's part would enhance Company's defensibility.

Other Instructions

- See attached letter MJA:CTF/AL. 05/21/91

Pl.'s Ex. 14.

18. On June 18, 1991, Mr. Knoll announced to R&M employees the commencement of a company-wide restructuring and downsizing. The announcement was posted on the bulletin boards at Mr. Hockett's office building and was sent to all Level II managers, including Mr. Hockett. Nowhere in this announcement does Mr. Knoll state or suggest that an early retirement package was under consideration as a method to effect this restructuring. Pl.'s Ex. 15; Little Test.

at 34; Hockett Test. at 45.

19. On June 28, 1991, the agenda before the Restructuring Committee included a progress report on restructuring and "Termination Package Notice (Impact & Do We have to Act on It?)." Pl.'s Ex. 61. Mr. Knoll testified in his deposition that the discussion of the Termination Package Notice involved corporate restructuring, which included Sun, Inc. Knoll Dep. at 32.

20. In June 1991, Mr. Hockett asked Mr. Waitneight about the possibility of a receiving a package upon his retirement. When Mr. Hockett asked if he were still right in assuming that no package would be made available, Mr. Waitneight responded, "You're right." Hockett Test. at 30-31. Mr. Hockett did not ask about rumors of early retirement programs, what might be available in the future, or whether any plans were under consideration. Id. at 82.

21. In response to questioning by the Court, Alfred Little, Jr., who was R&M's Director of Human Resources during the time period in question, testified that if a person could only make one telephone call to find out the status of proposed changes to SCIRP, the call should be to Mr. Rutherford. Little Test. at 52.

22. Mr. Hockett contacted Mr. Rutherford on June 25, 1991, to ask if there were any possibility of receiving a package. Mr. Hockett testified that Mr. Rutherford "told me two things that I recall very specifically. One is, he said, 'Paul, Ed Foss told me one time that you don't want to ever leave the company until the company is ready for you to leave.' And I said back to him, 'Bill, as far as I'm concerned Peter Waitneight is telling me that the

company is ready for me to leave." Mr. Rutherford then told Mr. Hockett that he would look into it and see what he could do. Hockett Test. at 41-42

23. Mr. Rutherford never told Mr. Hockett that an early retirement package was under serious consideration by Sun, Inc. or R&M at that time, although Mr. Rutherford was personally involved in that consideration. Rutherford Dep. at 10-12.

24. Prior to June 25, 1991, responsible officers of Sun, Inc., and R&M were seriously considering various alternative "packages" to be employed in connection with anticipated downsizing of the Sun companies. Anderman Test. at 81-84; Little Test. at 67-75; Knoll Dep. at 18-19.

25. After Mr. Rutherford failed to inform him that a package was under consideration, Mr. Hockett retired on July 1, 1991 in order to take advantage of what he thought was the only enhancement available to him, a 2½% pension enhancement under the SCIRP which was scheduled to expire on July 1, 1991. Hockett Test. at 27-30; Pl.'s Ex. 63.

26. Pursuant to SCIRP, at the time of his retirement Mr. Hockett was entitled to receive benefits in the form of a lump sum payment of \$18,585.69 and monthly retirement payments of \$4,340.09.

27. Although Mr. Hockett retired on July 1, 1991 thus terminating his employment, he continued managing Sun's credit card center as an independent contractor until October 31, 1991. Hockett Test. at 96-102.

28. Before he agreed to provide services to R&M as an

independent contractor, Mr. Hockett knew that by retiring he was giving up his rights to any benefits that might be offered under SCIRP to active employees after his retirement. Hockett Test. at 95-98.

29. Mr. Hockett voluntarily retired from R&M. Hockett Test. at 95-99.

30. On or about August 28, 1991, Sun, Inc. announced that it would offer the VRTP, an early retirement package pursuant to Amendment No. 1991-1 to the SCIRP and made effective on September 1, 1991, which added Section 3.20 to the terms of the SCIRP and states in pertinent part the following:

Voluntary Retirement and Termination Program. The following enhancements to benefits payable under the Plan shall be available to all Participants who voluntarily elect to terminate their employment under the Voluntary Retirement and Termination Program in effect between September 1, 1991 and October 15, 1991 pursuant to a written election filed with the Company between September 1, 1991 and October 15, 1991 pursuant to a written election filed with the Company between September 1, 1991 and October 15, 1991

The VRTP offered "enhancements to benefits payable under the Plan" of an additional three (3) years of credited service and an additional three (3) years of age in the calculation of retirement benefits; severance payments of three (3) week base pay for every completed year of service, with a cap of 60 weeks of pay; and a bonus. Pl.'s Ex. 16A.

31. The VRTP provided the following language regarding eligibility to participate in the SCIRP amendment:

II. Eligibility

These guidelines apply to the following individuals

classified in a "regular" or "part-time" employee status who are on the active payroll:

- A. Exempt employees.
- B. Non-exempt, non-represented salaried employees.
- C. Non-exempt represented salaried employees whose collective bargaining unit has been approved for the program.

Individuals in "seasonal", "service", or "temporary" employee status are not eligible; individuals in an eligible employee status who are on Medium or Long Term Disability or any form of leave of absence are eligible only for the voluntary retirement features.

Pl.'s Ex. 52 (emphasis added).

32. As an independent contractor, Mr. Hockett was not on the active payroll, but rather was paid out of accounts receivable. Therefore, after July 1, 1991, Mr. Hockett was not a "regular" or "part-time" employee on Sun R&M's active payroll. After July 1, 1991, he was not an exempt employee; non-exempt, non-salaried employee; or a non-exempt represented salaried employee. Anderman Test. at 155-56; Little Test. at 58-59; Schaeffer Test. at 8-11.

33. After the announcement of the VRTP, Mr. Hockett requested that he be allowed to participate in the program so he could take advantage of the new enhancements. Hockett Test. at 60-61.

34. Neil J. Horgan, then Plan Administrator of the SCIRP, determined that Mr. Hockett was ineligible to participate in the VRTP. Horgan Test. at 44-47.

35. Mr. Hockett would not have retired under the temporary pension enhancement if he had known in June 1991 that there was a possibility that Sun would offer an early retirement package to replace the 2½% pension enhancement within the next year.

Hockett Test. at 42.

CONCLUSIONS OF LAW

1. This Court has jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132.

2. Venue is proper under 29 U.S.C. § 1132(3)(2) and 28 U.S.C. § 1391.

3. The SCIRP is an "employee pension benefit plan" within the meaning of 29 U.S.C. § 1002(A).

4. Mr. Hockett is a participant in the SCIRP as he is a former employee who is eligible to receive and is receiving benefits from the SCIRP. 29 U.S.C. § 1002(7).

5. As a participant, Mr. Hockett has standing to bring (1) a claim for benefits under 29 U.S.C. § 1132(a)(1)(B) and (2) a claim for breach of fiduciary duty against Sun under 29 U.S.C. §§ 1109 and 1132(a)(2) and (3). Firestone Tire & Rubber Co. v. Bruch, 439 U.S. 101, 117-18 (1989); Raymond v. Mobil Oil Corp., 983 F.2d 1528 (10th Cir. 1993); Mitchell v. Mobil Oil Corp., 896 F.2d 463 (10th Cir. 1993).

6. Mr. Hockett's employment with R&M was terminated upon his retirement July 1, 1991. Therefore he was no longer on the "active payroll" of R&M, and accordingly was not eligible to opt into the VRTP during the 45-day election period in which the VRTP was offered to Sun employees. Therefore, his claim for benefits under the plan is denied.

7. ERISA provides that a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. 29 U.S.C. § 1002(21)(A); Maez v. Mountain States Tel. & Tel., 54 F.3d 1488 (10th Cir. 1995).

8. Mr. Waitneight was not a "fiduciary" under ERISA.

9. Any representations by Mr. Waitneight to Mr. Hockett were not breaches of fiduciary duty under ERISA because Mr. Waitneight was not a fiduciary.

10. As Senior Vice President of Human Resources with significant responsibilities in connection with SCIRP, Mr. Rutherford was a "fiduciary" for purposes of ERISA.

11. As a fiduciary, Mr. Rutherford was required to discharge his duties with respect to the plan "solely in the interest of the participants and beneficiaries." 29 U.S.C. § 1104(a)(1).

12. A fiduciary may not "'materially mislead those to whom the duties of loyalty and prudence . . . are owed.'" Maez, 54 F.3d at 1499 (emphasis added) (quoting Berlin v. Michigan Bell Tel. Co., 858 F.2d 1154, 1163 (6th Cir. 1988)); see Howe v. Variety Corp., 36 F.3d 746, 753 (8th Cir. 1994); see also Mullins v. Pfizer, Inc., 23

F.3d 663, 668-69 (2d Cir. 1994); Vartanian v. Monsanto Corp., 14 F.3d 697, 702 (1st Cir. 1994); Anweiler v. American Elec. Power Serv. Corp., 3 F.3d 986, 991 (7th Cir. 1993); Fischer v. Philadelphia Elec. Co., 994 F.2d 130-133-35 (3d Cir.), cert. denied, 114 S.Ct. 622 (1993); Drennan v. General Motors Corp., 977 F.2d 246, 250-52 (6th Cir. 1992).

13. Fiduciaries do not have an affirmative duty to initiate communications with potential plan participants about the future availability of benefits under a plan or to reveal the financial condition of the employer. See Maez, 54 F.3d at 1500 (quoting Berlin, 858 F.2d at 1164).

14. However, if the fiduciary does communicate with potential plan participants after serious consideration has been given concerning a future implementation or offering under the plan, then any material misrepresentations may constitute a breach of the fiduciary's duty. Maez, 54 F.3d at 1500 (quoting Berlin, 858 F.2d at 1864).

15. The duty to avoid material misrepresentations requires a fiduciary to fairly disclose the progress of its serious considerations to make a plan available to affected employees. See Maez, 54 F.3d at 1500; Drennan v. General Motors Corp., 977 F.2d 246, 251 (6th Cir. 1992), cert. denied, 113 S.Ct. 2416 (1993).

16. "[I]n some instances, a fiduciary's duty goes beyond merely refraining from making affirmative misrepresentations." Howe, 36 F.3d at 754. A fiduciary may create a misrepresentation by failing to disclose "circumstances that threaten interests

relevant to the relationship.'" Wilson v. Southwestern Bell Tel. Co., 55 F.3d 399, 406 (8th Cir. 1995) (quoting Howe, 36 F.3d at 754); see also In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation, 57 F.3d 1255, 1264 (3d Cir. 1995) (noting that a fiduciary breaches his duty when the fiduciary "fails to provide information when [he] knows that [his] failure to do so might cause harm . . . to individual plan participants and beneficiaries"); Eddy v. Colonial Life Ins. Co. of America, 919 F.2d 747, 750-51 (D.C. Cir. 1990) ("'A beneficiary, about to plunge into a ruinous course of dealing, may be betrayed by silence as well as by the spoken word.'" (citation omitted)).

17. As a fiduciary, Mr. Rutherford was required to "answer [Mr. Hockett's] questions forthrightly." See In re Unisys, 57 F.3d at 1265 n.15 (quoting Fischer v. Philadelphia Elec. Co., 994 F.2d 130, 135 (3d Cir. 1993)).

18. A fiduciary's misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision about if and when to retire. Fischer, 994 F.2d at 135.

19. The content of communications and whether such communications constitute misrepresentations are questions of fact. Fischer, 994 F.2d at 135. Whether the misrepresentation is material is a mixed question of law and fact. Id.

20. Mr. Rutherford's failure to tell Mr. Hockett that Sun was considering a new package when Mr. Hockett specifically asked him about the availability of such packages and Mr. Rutherford's

statement that he would "look into" the possibility of a package, thus falsely suggesting that he did not know whether one was under consideration and would actively undertake to determine whether one was, constitute misrepresentations which materially misled Mr. Hockett, causing him to retire before implementation of the more beneficial package.

21. Pursuant to 29 U.S.C. § 1132(a)(3), Mr. Hockett is entitled to restitution in the stipulated amount of \$184,256.91 plus a bonus amount of \$14,133.33 to compensate him for benefits under the VRTP of which he has been deprived, with interest at the rate provided by law from November 1, 1991 until paid. Mr. Hockett is also entitled to reasonable attorney fees. Section 502(g)(1) of ERISA; Pratt v. Petroleum Prod. Management Plan, 920 F.2d 651 (10th Cir. 1990); Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978).

IT IS SO ORDERED

This 18TH day of October, 1995.


Sven Erik Holmes
United States District Judge

ENTERED ON DOCKET

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DATE 007 10 1995

BARBARA FRICKER and JIM FRICKER,)
)
 Plaintiffs,)

-vs-

No. 94-C-1158-K

THE GOLDEN CORRAL CORPORATION)
 d/b/a GOLDEN CORRAL RESTAURANT)
 and PHIL ZINGA,)
)
 Defendants.)

FILED

OCT 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

NOW on this 17 day of October, 1995, upon Plaintiffs' Motion to Dismiss Phil Zinga as a party Defendant, the Court for good cause shown, dismisses Phil Zinga as a party Defendant.

WITNESS MY HAND this 17 day of October, 1995.

s/ TERRY C. KERN

JUDGE OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE 10 18 1995

FILED

OCT 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
DENISE TOTTRRESS aka DENISE S.)
TOTTRRESS; UNKNOWN SPOUSE IF)
ANY OF DENISE TOTTRRESS aka)
DENISE S. TOTTRRESS; EVERETT C.)
TOTTRRESS; UNKNOWN SPOUSE IF)
ANY OF EVERETT C. TOTTRRESS;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
Defendants.)

Civil Case No. 95-C 731K

ORDER

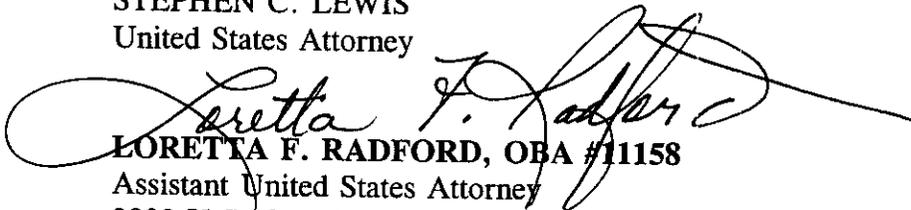
Upon the Motion of the United States of America, acting on behalf of the Secretary of Housing and Urban Development, by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, and for good cause shown it is hereby **ORDERED** that this action shall be dismissed without prejudice.

Dated this 18 day of Oct, 1995.

s/ TERRY C. KLEIN

UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT:
STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3900 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 ELMER THOMPSON aka ELMER W.)
 THOMPSON; GEORGELLA)
 THOMPSON aka GEORGE ELLA)
 THOMPSON; STATE OF OKLAHOMA)
 ex rel OKLAHOMA TAX)
 COMMISSION; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
 Defendants.)

FILED

OCT 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 19 1995

Civil Case No. 95-C 738K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of Oct,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant
District Attorney, Tulsa County, Oklahoma; STATE OF OKLAHOMA ex rel OKLAHOMA
TAX COMMISSION, appears not having previously filed its Disclaimer; and the
Defendants, ELMER THOMPSON aka ELMER W. THOMPSON and GEORGELLA
THOMPSON aka GEORGE ELLA THOMPSON, appear not, but make default.

The Court being fully advised and having examined the court file finds that the
Defendant, ELMER THOMPSON aka ELMER W. THOMPSON will hereinafter be referred
to as ("ELMER THOMPSON") and GEORGELLA THOMPSON aka GEORGE ELLA

NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

THOMPSON will hereinafter be referred to as ("GEORGELLA THOMPSON"). ELMER THOMPSON and GEORGELLA THOMPSON are husband and wife.

The Court being fully advised and having examined the court file finds that the Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, each waived service of Summons on August 7, 1995;.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on September 5, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Disclaimer on September 5, 1995; and that the Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lots Seven (7), Eight (8) and Nine (9), Block One (1), CRAWFORD ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof, LESS AND EXCEPT a portion of Lot 9, being more particularly described as follows, to-wit: Beginning at the Northeast corner of Lot 9, Block 1, CRAWFORD ADDITION; thence West along the North line of said lot a distance of 47.5 feet to a point; thence in a Southwesterly direction a distance of 114.5 feet to the Southeast corner of Lot 9 of said Block and Addition; thence in a Northeasterly direction a distance of 146.87 feet to the Northeast corner of Lot 9, Block 1, CRAWFORD ADDITION to the point of beginning.

The Court further finds that on October 6, 1986, the Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, executed and delivered to SECURITY BANK their mortgage note in the amount of \$84,713.00, payable in monthly installments, with interest thereon at the rate of ten percent (10%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, husband and wife, executed and delivered to SECURITY BANK a mortgage dated October 6, 1986, covering the above-described property. Said mortgage was recorded on October 10, 1986, in Book 4975, Page 1790, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 10, 1986, SECURITY BANK assigned the above-described mortgage note and mortgage to MORTGAGE CLEARING CORPORATION. This Assignment of Mortgage was recorded on October 14, 1986, in Book 4976, Page 523, in the records of Tulsa County, Oklahoma. A corrected assignment was recorded on November 17, 1986 in Book 4983, Page 338, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 1, 1988, MORTGAGE CLEARING CORPORATION assigned the above-described mortgage note and mortgage to TRIAD BANK, N.A.. This Assignment of Mortgage was recorded on July 18, 1989, in Book 5195, Page 644, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 17, 1990, TRIAD BANK, N.A. assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, its successors and assigns. This Assignment of Mortgage was recorded on January 24, 1990, in Book 5232, Page 1326, in the records of Tulsa County, Oklahoma.

The Court further finds that on January 10, 1990, the Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on July 27, 1990, January 9, 1991, January 8, 1992, and July 7, 1992.

The Court further finds that the Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, are indebted to the Plaintiff in the principal sum of \$111,999.95, plus interest at the rate of 10 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$56.00 which became a lien on the property as of June 26, 1992; and a lien in the amount of \$54.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, disclaims any right, title, or interest in the subject property.

The Court further finds that the Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, in the principal sum of \$111,999.95, plus interest at the rate of 10 percent per annum from August 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$110.00, plus costs and interest, for personal property taxes for the years 1991 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, ELMER THOMPSON, GEORGELLA THOMPSON, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, ELMER THOMPSON and GEORGELLA THOMPSON, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$110.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

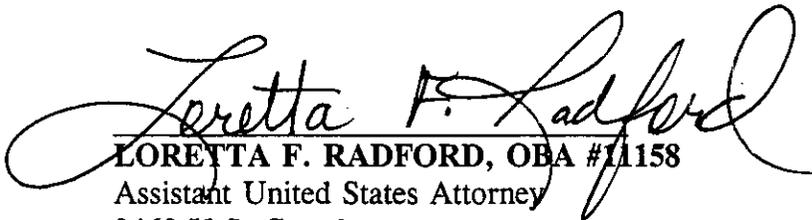
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 19 1995

UNITED STATES OF AMERICA,)
Plaintiff,)
vs.)
RANDALL C. SIMMS aka RANDALL)
CURTIS SIMMS; UNKNOWN SPOUSE,)
if any, OF RANDALL C. SIMMS aka)
RANDALL CURTIS SIMMS;)
RESOLUTION TRUST CORPORATION)
in its corporate capacity and as receiver)
for SOUTHWEST FEDERAL SAVINGS)
ASSOCIATION successor to)
BRIERCROFT SERVICE)
CORPORATION, and as receiver for)
SOUTHWEST SAVINGS)
ASSOCIATION, and as receiver for)
SECURITY SAVINGS AND LOAN)
ASSOCIATION; FAIRFIELD)
AFFILIATES; FGB REALTY)
ADVISORS, INC.; THE UNKNOWN)
HEIRS, PERSONAL)
REPRESENTATIVES, DEVISEES,)
TRUSTEES, SUCCESSORS, AND)
ASSIGNS OF JOY G. THOMAS,)
DECEASED; STATE OF OKLAHOMA)
ex rel OKLAHOMA TAX)
COMMISSION; COUNTY TREASURER,)
Tulsa County, Oklahoma; BOARD OF)
COUNTY COMMISSIONERS, Tulsa)
County, Oklahoma,)
Defendants.)

FILED

OCT 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 94-C 1127K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of Oct,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant

**NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT**

District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, appears not having previously filed its disclaimer; and the Defendants, RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; UNKNOWN SPOUSE IF ANY OF RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; RESOLUTION TRUST CORPORATION in its corporate capacity and as receiver for Southwest Federal Savings Association successor to Briercroft Service Corporation, and as receiver for Southwest Savings Association and as receiver for Security Savings and Loan Association; FAIRFIELD AFFILIATES; FGB REALTY ADVISORS, INC.; THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, DEVISEES, TRUSTEES, SUCCESSORS, AND ASSIGNS OF JOY G. THOMAS, DECEASED; and WES CARTER, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, RESOLUTION TRUST CORPORATION in its corporate capacity and as receiver for Southwest Federal Savings Association successor to Briercroft Service Corporation and as receiver for Southwest Savings Association, and as receiver for Security Savings and Loan Association, acknowledged receipt of Summons and Complaint on January 25, 1995; that the Defendant, FAIRFIELD AFFILIATES, acknowledged receipt of Summons and Complaint via certified mail on December 12, 1994; that the Defendant, FGB REALTY ADVISORS, INC., acknowledged receipt of Summons and Complaint via certified mail on December 12, 1994; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, acknowledged receipt of Summons and Complaint via certified mail on December 12, 1994; and that the Defendant, WES CARTER, acknowledged receipt of Summons and Complaint via certified mail on June 6, 1995.

The Court further finds that the Defendants, RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; UNKNOWN SPOUSE IF ANY OF RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; THE UNKNOWN HEIRS PERSONAL REPRESENTATIVES, DEVISEES, TRUSTEES, SUCCESSORS, AND ASSIGNS OF JOY G. THOMAS, DECEASED, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 20, 1995, and continuing through August 24, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; UNKNOWN SPOUSE IF ANY OF RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; THE UNKNOWN HEIRS PERSONAL REPRESENTATIVES, DEVISEES, TRUSTEES, SUCCESSORS, AND ASSIGNS OF JOY G. THOMAS, DECEASED, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; UNKNOWN SPOUSE IF ANY OF RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; THE UNKNOWN HEIRS PERSONAL REPRESENTATIVES, DEVISEES, TRUSTEES, SUCCESSORS, AND ASSIGNS OF JOY G. THOMAS, DECEASED. The Court conducted an inquiry into the

sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendant, RANDALL C. SIMMS aka RANDALL CURTIS SIMMS will hereinafter be referred to as ("RANDALL C. SIMMS").

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on December 27, 1995; that the Defendant, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION, filed its Disclaimer on January 27, 1995; and that the Defendants, RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; UNKNOWN SPOUSE IF ANY OF RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; RESOLUTION TRUST CORPORATION in its corporate capacity and as receiver for Southwest Federal Savings Association successor to Briercroft Service Corporation, and as receiver for Southwest Savings Association and as receiver for Security Savings and Loan Association; FAIRFIELD AFFILIATES; FGB REALTY ADVISORS, INC.; THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, DEVISEES, TRUSTEES,

SUCCESSORS, AND ASSIGNS OF JOY G. THOMAS, DECEASED; and WES CARTER, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Three (3), in Block Three (3), in MARION TERRACE ADDITION, a subdivision to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded Plat thereof.

The Court further finds that on April 29, 1983, the Defendant, RANDALL C. SIMMS, executed and delivered to Charles F. Curry Company his mortgage note in the amount of \$38,150.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, RANDALL C. SIMMS, a single person, executed and delivered to Charles F. Curry Company a mortgage dated April 29, 1983, covering the above-described property. Said mortgage was recorded on May 4, 1983, in Book 4688, Page 1706, in the records of Tulsa County, Oklahoma.

The Court further finds that on December 21, 1988, Charles F. Curry Company assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development, his successors and assigns. This Assignment of Mortgage was recorded on January 9, 1989, in Book 5160, Page 974, in the records of Tulsa County, Oklahoma.

The Court further finds that on April 20, 1990, the Defendant, RANDALL C. SIMMS, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on June 26, 1991.

The Court further finds that the Defendant, RANDALL C. SIMMS, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, RANDALL C. SIMMS, is indebted to the Plaintiff in the principal sum of \$64,896.38, plus interest at the rate of 12 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$10.00 which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; UNKNOWN SPOUSE IF ANY OF RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; RESOLUTION TRUST CORPORATION in its corporate capacity and as receiver for Southwest Federal Savings Association successor to Briercroft Service Corporation, and as receiver for Southwest Savings Association and as receiver for

Security Savings and Loan Association; FAIRFIELD AFFILIATES; FGB REALTY ADVISORS, INC.; THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, DEVISEES, TRUSTEES, SUCCESSORS, AND ASSIGNS OF JOY G. THOMAS, DECEASED; and WES CARTER, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, RANDALL C. SIMMS, in the principal sum of \$64,896.38, plus interest at the rate of 12 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$10.00, plus costs and interest, for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; UNKNOWN SPOUSE IF ANY OF RANDALL C. SIMMS aka RANDALL CURTIS SIMMS; 2RESOLUTION TRUST CORPORATION in its corporate capacity and as receiver for Southwest Federal Savings Association successor to Briercroft Service Corporation, and as receiver for Southwest Savings Association and as receiver for Security Savings and Loan Association; FAIRFIELD AFFILIATES; FGB REALTY ADVISORS, INC.; THE UNKNOWN HEIRS, PERSONAL REPRESENTATIVES, DEVISEES, TRUSTEES, SUCCESSORS, AND ASSIGNS OF JOY G. THOMAS, DECEASED; and WES CARTER, STATE OF OKLAHOMA ex rel OKLAHOMA TAX COMMISSION and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, RANDALL C. SIMMS, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the
Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa
County, Oklahoma, in the amount of \$10.00, personal
property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await
further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that
pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all
instances any right to possession based upon any right of redemption) in the mortgagor or
any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from
and after the sale of the above-described real property, under and by virtue of this judgment
and decree, all of the Defendants and all persons claiming under them since the filing of the
Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim
in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 19 1995

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
WILLIAM B. ELDER; OSTEOPATHIC)
HOSPITAL FOUNDERS ASSOCIATION)
dba Tulsa Regional Medical Center)
formerly dba Oklahoma Osteopathic)
Hospital; OAK TREE MORTGAGE)
CORPORATION fka United Bankers)
Mortgage Corporation;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

FILED
OCT 18 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95 C 611K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of Oct,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant
District Attorney, Tulsa County, Oklahoma; the Defendant, OSTEOPATHIC HOSPITAL
FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly dba Oklahoma
Osteopathic Hospital, appears by its Attorney, Daniel M. Webb; and the Defendants,
WILLIAM B. ELDER and OAK TREE MORTGAGE CORPORATION fka United Bankers
Mortgage Corporation, appear not, but make default.

**NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY.
UPON RECEIPT.**

The Court being fully advised and having examined the court file finds that the Defendant, WILLIAM B. ELDER, was served with process a copy of Summons and Complaint on August 15, 1995; that the Defendant, OAK TREE MORTGAGE CORPORATION fka United Bankers Mortgage Corporation, signed a Waiver of Summons on July 10, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 20, 1995; that the Defendant, OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly dba Oklahoma Osteopathic Hospital, filed its Answer on August 14, 1995; and that the Defendants, WILLIAM B. ELDER and OAK TREE MORTGAGE CORPORATION fka United Bankers Mortgage Corporation, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, WILLIAM B. ELDER, is now a single unmarried person, and has remained an unmarried person since his Divorce from Shirley G. Elder, in Muskogee County, Oklahoma, Case No. D 80-116, on February 22, 1980.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT THREE (3), BLOCK FOURTEEN (14), CHEROKEE VILLAGE SECOND, AN ADDITION IN TULSA COUNTY, OKLAHOMA, ACCORDING TO THE RECORDED PLAT THEREOF.

The Court further finds that on February 27, 1987, the Defendant, WILLIAM B. ELDER, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION, his mortgage note in the amount of \$43,596.00, payable in monthly installments, with interest thereon at the rate of Eight percent (8%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, WILLIAM B. ELDER, a single person, executed and delivered to UNITED BANKERS MORTGAGE CORPORATION, a mortgage dated February 27, 1987, covering the above-described property. Said mortgage was recorded on March 4, 1987, in Book 5005, Page 2469, in the records of Tulsa County, Oklahoma. This Mortgage was re-recorded on March 4, 1987, in Book 5005, Page 2497, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 23, 1988, Oak Tree Mortgage Corporation fka United Bankers Mortgage Corporation, assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on December 7, 1988, in Book 5144, Page 846, in the records of Tulsa County, Oklahoma.

The Court further finds that on November 3, 1988, the Defendant, WILLIAM B. ELDER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on November 30, 1989, November 16, 1990, and September 19, 1991.

The Court further finds that the Defendant, WILLIAM B. ELDER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly

installments due thereon, which default has continued, and that by reason thereof the Defendant, WILLIAM B. ELDER, is indebted to the Plaintiff in the principal sum of \$66,078.91, plus interest at the rate of 8 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$27.00 which became a lien on the property as of June 26, 1992, and a lien in the amount of \$23.00 which became a lien on the property as of June 25, 1993. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly dba Oklahoma Osteopathic Hospital, has a lien on the property which is the subject matter of this action by virtue of a judgment lien in the amount of \$5,498.75, together with interest thereon at a rate of 10.920 percent per annum and for attorney's fees in the sum of \$1,090.00 which became a lien on the property as of March 16, 1989. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, WILLIAM B. ELDER and OAK TREE MORTGAGE CORPORATION fka United Bankers Mortgage Corporation, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, WILLIAM B. ELDER, in the principal sum of \$66,078.91, plus interest at the rate of 8 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$50.00, plus costs and interest, for personal property taxes for the years 1991 and 1992, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly dba Oklahoma Osteopathic Hospital, have and recover judgment in the amount of \$5,498.75, together with interest, and \$1,090 for attorney's fees, for its judgment lien.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, WILLIAM B. ELDER, and OAK TREE MORTGAGE CORPORATION fka United Bankers Mortgage Corporation, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, WILLIAM B. ELDER, to satisfy the money judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of the Defendant, OSTEOPATHIC HOSPITAL FOUNDERS ASSOCIATION dba Tulsa Regional Medical Center formerly dba Oklahoma Osteopathic Hospital, in the amount of \$5,498.75, together with interest, and \$1,090.00, attorney's fees.

Fourth:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$50.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

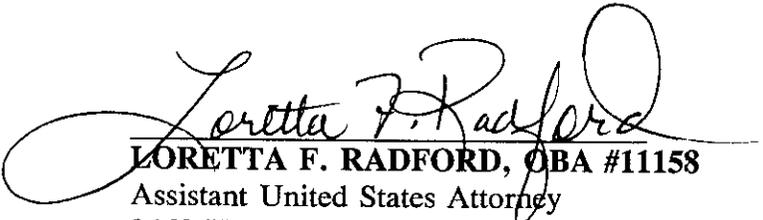
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158

Assistant United States Attorney
3460 U.S. Courthouse
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(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842

Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma



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Osteopathic Hospital Founders
Association dba Tulsa Regional
Medical Center formerly dba
Oklahoma Osteopathic Hospital

Judgment of Foreclosure
Civil Action No. 95-C 611K

LFR:flv

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 19 1995

FILED

OCT 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
R. L. PETE PERRY; THREE LAKES)
VILLAGE PROPERTY OWNERS')
ASSOCIATION, INC.; CITY OF)
OWASSO, Oklahoma; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
Defendants.

Civil Case No. 95-C 102K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of Oct, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, R. L. PETE PERRY, THREE LAKES VILLAGE PROPERTY OWNERS' ASSOCIATION, INC., and CITY OF OWASSO, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, R. L. PETE PERRY, is a single, unmarried person.

The Court being fully advised and having examined the court file finds that the Defendant, R. L. PETE PERRY, acknowledged receipt of Summons and Complaint via

certified mail on March 15, 1995; that the Defendant, THREE LAKES VILLAGE

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

PROPERTY OWNERS' ASSOCIATION, INC., acknowledged receipt of Summons and Complaint via certified mail on March 15, 1995; and the Defendant, CITY OF OWASSO, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on February 15, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on February 9, 1995; and that the Defendants, R. L. PETE PERRY, THREE LAKES VILLAGE PROPERTY OWNERS' ASSOCIATION, INC. and CITY F OWASSO, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot One (1), Block Two (2), THREE LAKES VILLAGE, a resubdivision of a part of Lot 15, Block 3, THREE LAKES, an Addition to the City of Owasso, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on May 4, 1983, Roger L. Littleton and Jayme L. Littleton, executed and delivered to CHARLES F. CURRY COMPANY their mortgage note in the amount of \$44,950.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Roger L. Littleton and Jayme L. Littleton, husband and wife, executed

and delivered to CHARLES F. CURRY COMPANY a mortgage dated May 4, 1983, covering the above-described property. Said mortgage was recorded on May 6, 1983, in Book 4689, Page 1641, in the records of Tulsa County, Oklahoma. Thereafter a Corrected Mortgage was filed which was re-recorded on June 9, 1983 in Book 4697, Page 1712 in the records of Tulsa County, Oklahoma.

The Court further finds that on January 10, 1989, Charles F. Curry Company assigned the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development. This Assignment of Mortgage was recorded on January 19, 1989, in Book 5162, Page 960, in the records of Tulsa County, Oklahoma. A corrected Assignment of Mortgage dated March 3, 1989 was recorded on March 7, 1989 in Book 5170, Page 1176 in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendant, R. L. PETE PERRY, currently holds record title to the subject property via mesne conveyances and is the current assumptor of the subject indebtedness. The Defendant, R. L. PETE PERRY, was granted a General Warranty Deed dated September 22, 1986, which was filed on October 3, 1986, Book 4974, Page 310 in the records of Tulsa County, Oklahoma; this General Warranty Deed was re-filed to correct the legal description on October 9, 1986, in Book 4975, Page 1108 in the records of Tulsa County, Oklahoma.

The Court further finds that on August 31, 1991, the Defendant, R. L. PETE PERRY, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on December 21, 1988.

The Court further finds that the Defendant, R. L. PETE PERRY, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, R. L. PETE PERRY, is indebted to the Plaintiff in the principal sum of \$81,122.94, plus interest at the rate of 12 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$25.00 which became a lien on the property as of June 23, 1994. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, R. L. PETE PERRY, THREE LAKES VILLAGE PROPERTY OWNERS' ASSOCIATION, INC., and CITY OF OWASSO, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, R. L. PETE PERRY, in the principal sum of \$81,122.94, plus interest at the rate of 12 percent per annum from October 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$25.00, plus costs and interest, for personal property taxes for the year 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, R. L. PETE PERRY, THREE LAKES VILLAGE PROPERTY OWNERS' ASSOCIATION, INC., CITY OF OWASSO, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, R. L. PETE PERRY, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$25.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DONALD E. HEDGE; FREDA M.)
 HEDGE; FEDERAL NATIONAL)
 MORTGAGE ASSOCIATION;)
 COUNTY TREASURER, Tulsa County,)
 Oklahoma; BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET
DATE OCT 19 1995

FILED

OCT 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Civil Case No. 95-C 438K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of Oct,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant
District Attorney, Tulsa County, Oklahoma; the Defendant, FEDERAL NATIONAL
MORTGAGE ASSOCIATION, appears not having previously filed a Disclaimer; and the
Defendants, DONALD E. HEDGE and FREDA M. HEDGE, appear not, but make default.

The Court being fully advised and having examined the court file finds that the
Defendant, FEDERAL NATIONAL MORTGAGE ASSOCIATION, signed a Waiver of
Summons on May 19, 1995.

The Court further finds that the Defendants, DONALD E. HEDGE and
FREDA M. HEDGE, were served by publishing notice of this action in the Tulsa Daily

NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 20, 1995, and continuing through August 24, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, DONALD E. HEDGE and FREDA M. HEDGE. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed

their Answers on May 31, 1995; that the Defendant, FEDERAL NATIONAL MORTGAGE ASSOCIATION, filed its Disclaimer on May 23, 1995; and that the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, are husband and wife.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twelve (12), Block Fourteen (14), AMENDED PLAT OF BLOCKS 10 THRU 16, OAK RIDGE ADDITION to the City of Tulsa, Tulsa County, State of Oklahoma, according to the recorded plat thereof.

The Court further finds that on September 22, 1972, the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, executed and delivered to HALL INVESTMENT COMPANY, their mortgage note in the amount of \$13,000.00, payable in monthly installments, with interest thereon at the rate of Seven percent (7%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, Husband and Wife, executed and delivered to HALL INVESTMENT COMPANY, a mortgage dated September 22, 1972, covering the above-described property. Said mortgage was recorded on September 26, 1972, in Book 4036, Page 143, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 5, 1972, HALL INVESTMENT COMPANY, assigned the above-described mortgage note and mortgage to FEDERAL

NATIONAL MORTGAGE ASSOCIATION. This Assignment of Mortgage was recorded on October 12, 1972, in Book 4038, Page 1721, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 16, 1986, FEDERAL NATIONAL MORTGAGE ASSOCIATION, assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was not recorded, however, payment was made to FEDERAL NATIONAL MORTGAGE ASSOCIATION, in 1990.

The Court further finds that on May 1, 1988, the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on August 1, 1989, April 1, 1990, March 1, 1991, and August 1, 1991.

The Court further finds that the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, are indebted to the Plaintiff in the principal sum of \$13,534.52, plus interest at the rate of 7 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action in the amount.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$24.00 which became a lien on the property as of June 26, 1992, a lien in the amount of \$10.00 which became a lien on the

property as of June 25, 1993, and a lien in the amount of \$10.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, FEDERAL NATIONAL MORTGAGE ASSOCIATION, Disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, DONALD E. HEDGE and FREDA M. HEDGE, in the principal sum of \$13,534.52, plus interest at the rate of 7 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$44.00, plus costs and interest, for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, FEDERAL NATIONAL MORTGAGE ASSOCIATION, DONALD E. HEDGE and FREDA M. HEDGE, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, DONALD E. HEDGE and FREDA M. HEDGE, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$44.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

UNITED STATES DISTRICT JUDGE

21119

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE ~~OCT 19 1995~~

FILED

OCT 18 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 DAVID MARK IRETON aka David)
 Ireton; LORI JANE IRETON aka Lori)
 Ireton; GREENWOOD TRUST)
 COMPANY; CITY OF BROKEN)
 ARROW, Oklahoma; COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

Civil Case No. 95-C 578K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of Oct,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; the Defendants, DAVID MARK IRETON aka David Ireton and LORI JANE IRETON aka Lori Ireton, appear by their Attorney, J. Lyon Morehead; the Defendant, GREENWOOD TRUST COMPANY, appears by its Attorney, J. Michael Morgan; and the Defendant, CITY OF BROKEN ARROW, Oklahoma, appears by Michael R. Vanderburg, City Attorney, Broken Arrow, Oklahoma.

The Court being fully advised and having examined the court file finds that the Defendant, DAVID MARK IRETON aka David Ireton, signed a Waiver of Summons on

NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

July 5, 1995; that the Defendant, LORI JANE IRETON aka Lori Ireton, signed a Waiver of Summons on July 5, 1995; that the Defendant, GREENWOOD TRUST COMPANY, signed a Waiver of Summons on July 23, 1995; and that Defendant, CITY OF BROKEN ARROW, Oklahoma, was served a copy of Summons and Complaint on June 26, 1995, by Certified Mail.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 11, 1995; that the Defendant, CITY OF BROKEN ARROW, Oklahoma, filed its Answer on June 29, 1995; that the Defendant, GREENWOOD TRUST COMPANY, filed its Answer on July 25, 1995 and that the Defendants, DAVID MARK IRETON aka David Ireton and LORI JANE IRETON aka Lori Ireton, filed their Answer on July 27, 1995.

The Court further finds that the Defendant, DAVID MARK IRETON, is one and the same person as David Ireton and David M. Ireton, and will hereinafter be referred to as "DAVID MARK IRETON." The Defendant, LORI JANE IRETON, is one and the same person as Lori J. Ireton and Lori Ireton, and will hereinafter be referred to as "LORI JANE IRETON." The Defendants, DAVID MARK IRETON and LORI JANE IRETON, are husband and wife.

The Court further finds that on October 1, 1993, David M. Ireton and Lori J. Ireton, filed their voluntary petition in bankruptcy in Chapter 7 in the United States Bankruptcy Court, Northern District of Oklahoma, Case No. 93-03243-W. On January 21, 1994, the United States Bankruptcy Court for the Northern District of Oklahoma filed its Discharge of Debtor and the case was subsequently closed on April 18, 1994.

the above-described mortgage note and mortgage to the Secretary of Housing and Urban Development of Washington, D.C., his successors and assigns. This Assignment of Mortgage was recorded on June 24, 1992, in Book 5415, Page 0428, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 5, 1992, the Defendants, DAVID MARK IRETON and LORI JANE IRETON, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on December 18, 1992.

The Court further finds that the Defendants, DAVID MARK IRETON and LORI JANE IRETON, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, DAVID MARK IRETON and LORI JANE IRETON, are indebted to the Plaintiff in the principal sum of \$103,105.65, plus interest at the rate of 10 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, GREENWOOD TRUST COMPANY, has a lien on the property which is the subject matter of this action by virtue of a judgment lien in the amount of \$8,177.74, plus interest, which became a lien on the property as of July 16, 1993. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendant, CITY OF BROKEN ARROW, Oklahoma, claims no right title or interest in the subject real property, except insofar as is the lawful holder of certain easements as shown on the duly recorded plat.

The Court further finds that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, DAVID MARK IRETON and LORI JANE IRETON, in the principal sum of \$103,105.65, plus interest at the rate of 10 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, GREENWOOD TRUST COMPANY, have and recover judgment In Rem in the amount of \$8,177.74, plus interest for its judgment lien, plus the costs.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF BROKEN ARROW, Oklahoma, has no right, title or interest in the

subject real property, except insofar as it is the lawful holder of certain easements as shown on the duly recorded plat.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, COUNTY TREASURER and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, DAVID MARK IRETON and LORI JANE IRETON, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, DAVID MARK IRETON and LORI JANE IRETON, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, GREENWOOD TRUST COMPANY, in the amount of \$8,177.74, plus interest.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

s/ TERRY C. KERN

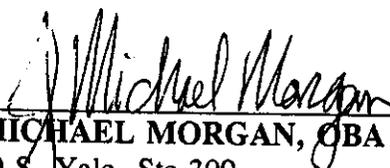
UNITED STATES DISTRICT JUDGE

APPROVED:

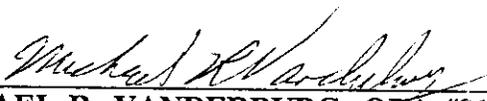
STEPHEN C. LEWIS
United States Attorney


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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma


J. MICHAEL MORGAN, OBA #6391
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Attorney for Defendant,
Greenwood Trust Company


J. LYON MOREHEAD, OBA #6373
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(918) 587-3161
Attorney for Defendants,
David Mark Ireton and
Lori Jane Ireton


MICHAEL R. VANDERBURG, OBA #9180
City Attorney,
CITY OF BROKEN ARROW
P. O. Box 610
Broken Arrow, OK 74012
Attorney for Defendant,
City of Broken Arrow, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C-578-K

LFR:flv

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

MONSI L'GGRKE,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF TULSA, et al.,)
)
 Defendants.)

Case No. 94-C-1004-H ✓

EDD 10/18/95

ORDER

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket #30) (regarding Plaintiff's oral Motion for Preliminary Injunction (as stated in his original Complaint) (Docket # 1); a Motion to Dismiss by Defendants City of Tulsa, Judge Powers, and Chief Palmer (Docket # 14); and a Motion to Dismiss by Defendants Sheriff Stanley Glanz and Sergeant Jack Seals (Docket # 18)) and Plaintiff's Objection to the Report and Recommendation of the U.S. Magistrate Judge (Docket #33).

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Based on a review of the Report and Recommendation of the Magistrate Judge and the Objection thereto, the Court hereby adopts and affirms the Report and Recommendation of the Magistrate Judge

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granting Defendants' Motions to Dismiss and denying Plaintiff's oral Motion for a Preliminary Injunction.

IT IS SO ORDERED.

This 16TH day of December 1995.



Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

FERN FRIEND and LOREN FRIEND,)
)
PLAINTIFFS,)
)
vs.)
)
ARROWHEAD STATOR & ROTOR, INC.,)
a Minnesota corporation; FORD MOTOR)
COMPANY, a Delaware corporation;)
CURRENCE DISTRIBUTING, INC., a)
Missouri corporation; TRU-PART)
MANUFACTURING CORP., a Minnesota)
corporation; AUTO ELECTRIC SERVICE)
AND SUPPLIES, INC., a Florida cor-)
poration; AUTO IGNITION PVT., LTD.,)
a foreign corporation; UNIPOINT)
ELECTRIC MANUFACTURING CO., LTD.,)
a foreign corporation,)
)
DEFENDANTS.)

CASE NO. 95-C-774-B

ENTERED
DATE OCT 18 1995

PLAINTIFFS' NOTICE OF VOLUNTARY DISMISSAL OF ACTION
WITHOUT PREJUDICE OF AUTO IGNITION PVT., LTD. AND
UNIPOINT ELECTRIC MANUFACTURING CO., LTD., ONLY

COME(S) NOW the Plaintiffs, Fern Friend and Loren Friend, and state that neither Auto Ignition Pvt., Ltd. nor Unipoint Electric Manufacturing Co., Ltd. have been served with Summons, have filed an answer, or other responsive pleadings; thus, Plaintiffs file this Notice of Voluntary Dismissal Without Prejudice and without order

of this Court, pursuant to Fed.R.Civ.P. 41(a)(1)(i), dismissing the above-styled and numbered action without prejudice to the filing of a future action against Auto Ignition Pvt., Ltd. and Unipoint Electric Manufacturing Co., Ltd., only, reserving all rights to proceed against all remaining parties or others who may be liable.

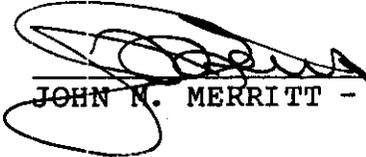


JOHN M. MERRITT - OBA #6146
MERRITT & ROONEY, INC.
P.O. BOX 60708
OKLAHOMA CITY, OKLAHOMA 73146
(405) 236-2222
ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 1995
a true and correct copy of the above and foregoing has been served upon
the following:

PHILLIP MCGOWAN, 1516 S. Boston,
Ste. 205, Tulsa, OK 74119, Atty for
Arrowhead Stator & Rotor, Inc.;
STEPHEN C. WILKERSON, P. O. Box
1560, Tulsa, OK 74101-1560, Atty
for Tru-Part Manufacturing Corp.;
CURTIS L. SMITH, P. O. Box 27350,
Oklahoma City, OK 73126, Atty for
Currence Distributing, Inc.; DAVID
B. DONCHIN, 920 N. Harvey, Oklahoma
City, OK 73102-2610, Atty for Auto
Electric Service and Supplies,
Inc.; RONALD STOCKWELL, 2 N. Main
St., Suite 506, Miami, OK 74354
(Advisory copy).



JOHN N. MERRITT - OBA #6146

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1995

BONNIE S. MASTERSON,

Plaintiff,

v.

RESOLUTION TRUST CORPORATION
as Receiver of SAVERS SAVINGS
ASSOCIATION, and ONTRA, INC.,

Defendants.

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No. CIV 95-392-B

94-947-B

ENTERED IN DOCKET
OCT 18 1995
DLS

ORDER

Upon the Dismissals With Prejudice filed by the Plaintiff Bonnie S. Masterson and by the Defendant Resolution Trust Corporation as Receiver of Savers Savings Association, and for good cause shown therein, IT IS HEREBY ORDERED, ADJUDGED AND DECREED, that the above-styled and numbered cause of action is hereby dismissed with prejudice to the filing of any further cause of action.

DATED this 17 day of October, 1995.

S/ THOMAS R. BRETT

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARK ANTHONY CHESTER,
Plaintiff,
vs.
TERRY RANEL, et al.,
Defendants.

No. 95-C-442-H

ENTERED ON DOCKET

DATE OCT 18 1995

FILED
OCT 17 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

Before the Court is Defendants' motion to dismiss, or in the alternative for summary judgment, filed on September 1, 1995. Plaintiff, a pro se litigant, has not responded.

Plaintiff's failure to respond to Defendants' motion constitutes a waiver of objection to the motion, and a confession of the matters raised by the motion. See Local Rule 7.1.C.¹ Accordingly, Defendants' motion to dismiss (doc. #4) is **granted** and the above captioned case is hereby **dismissed without prejudice** at this time.

IT IS SO ORDERED.

This 17th day of October, 1995.


Sven Erik Holmes
United States District Judge

¹Local Rule 7.1.C reads as follows:

Response Briefs. Response briefs shall be filed within fifteen (15) days after the filing of the motion. Failure to timely respond will authorize the court, in its discretion, to deem the matter confessed, and enter the relief requested.

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

MICHAEL EUGENE PRICE,)
)
 Plaintiff,)
)
 vs.)
)
 TULSA COUNTY DISTRICT COURT, et al.)
)
 Defendants.)

No. 95-C-811-H

ENTERED ON DOCKET

DATE OCT 18 1995

ORDER

On August 29, 1995, the Court granted Plaintiff, a state inmate, leave to file this civil rights action in forma pauperis. The Court now reviews Plaintiff's allegations and concludes that this action lacks and arguable basis in law and should be dismissed without prejudice pursuant to 28 U.S.C. § 1915(d).

In his pro se complaint, Plaintiff seeks monetary damages for the alleged violation of his constitutional rights during his state criminal trial. He alleges that, following the reversal of his conviction on the basis of the "presumed not guilty" jury instruction, Judge Clifford Hopper conspired with the Tulsa County District Attorney's office and the Tulsa County Public Defender's Office to convict him to a longer sentence than he had before the reversal. Plaintiff alleges that Defendants deprived him of a fair trial and effective assistance of counsel, and tried him even though a mandate had not yet been issued by the Court of Criminal Appeals. (Doc. #1.)

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal

(5)

courts without prepayment of fees or costs. Neitzke v. Williams, 490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law. Plaintiff cannot seek money damages for the alleged invalidity of his Tulsa County conviction prior to a determination that the conviction and resulting confinement are invalid. The Supreme Court recently held in Heck v. Humphrey, 114 S.Ct. 2364, 2372 (1994), that in order to recover damages in an action brought pursuant to 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment, or for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a prisoner must show that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal

authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."

Because the validity of Plaintiff's conviction and sentence has yet to be undermined, the Court must evaluate Plaintiff's claims to determine whether they challenge the constitutionality of his conviction or sentence. The Court concludes that they do. The majority of Plaintiff's allegations amount to claims of ineffective assistance of appointed counsel. If proved, these claims would call Plaintiff's conviction into question under cases such as Strickland v. Washington, 466 U.S. 668 (1984). Liberally construed, Plaintiff's complaint also alleges denial of a fair trial, prosecutorial misconduct, and lack of jurisdiction.

Although pro se pleadings are to be construed liberally, see Haines, 404 U.S. at 520-21, a review of the complaint reveals neither factual allegations nor legal theories that might arguably support a basis for relief. Neitzke, 490 U.S. at 325. As noted above a decision in Plaintiff's favor would necessarily imply that his conviction and resulting confinement are invalid. Therefore, Plaintiff's complaint must be dismissed at this time without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is hereby **dismissed without prejudice** pursuant to 28 U.S.C. § 1915(d). The

Clerk shall mail to Plaintiff a copy of the complaint.

IT IS SO ORDERED.

This 17TH day of OCTOBER, 1995.



Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE **FILED**
NORTHERN DISTRICT OF OKLAHOMA

WADE CARSON,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,²)
)
Defendant.)

OCT 17 1995
Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

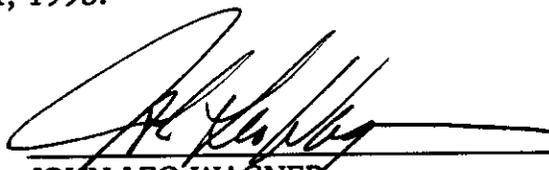
Case No: 95-C-328-W

ENTERED ON DOCKET
DATE OCT 18 1995

JUDGMENT

Judgment is entered in favor of the Plaintiff, Wade Carson, in accordance with this court's Order filed October 16, 1995.

Dated this 17th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

²Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

HAROLD D. HORNSBY,
Plaintiff,

vs.

MARK BAKER, BENJAMIN CHAPMAN,
STEVE WHITTLE, VERNON HOGUE

Defendants.

No. 95-C-829-H

ENTERED ON DOCKET

DATE ~~OCT 18 1995~~

ORDER

The Court recently granted Plaintiff, a state prisoner, leave to proceed in forma pauperis. The Court now reviews Plaintiff's allegations and concludes this action should be dismissed as frivolous under 28 U.S.C. § 1915(d).

In his pro se complaint, Plaintiff sues Mike Baker, Chief of the Tulsa Fire Department; Vernon Hogue, Administrative Chief of the Tulsa Fire Department; Steve Whittle, President of the Local Fire Fighters Union; and Benjamin Chapman, Counsel for the Local Fire Fighters Union. He alleges that, in September of 1990, Defendants conspired to fire him from his job as a fire fighter although he had no felony conviction. Plaintiff seeks declaratory, injunctive, and monetary relief.

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts. Neitzke v. Williams, 490 U.S. 319, 324 (1989). 28 U.S.C. § 1915 permits an indigent litigant to commence a civil action without prepayment of fees or costs. See 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows an in

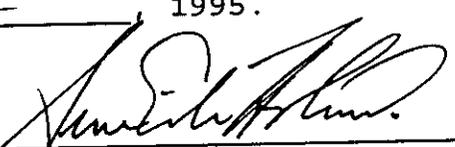
forma pauperis suit to be dismissed if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous under section 1915(d) if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327).

After liberally construing Plaintiff's pro se pleading, see Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that Plaintiff's action lacks an arguable basis in law as it is clear from the face of the complaint that Plaintiff's claims are barred by the two-year statute of limitations. See Fratus v. Deland, 49 F.3d 673, 674-75 (10th Cir. 1995) (district court may consider affirmative defense sua sponte only when the defense is "obvious from the face of the complaint" and "[n]o further factual record [is]required to be developed"); Meade v. Grubbs, 841 F.2d 1512, 1523 (10th Cir. 1988) (the applicable statute of limitations for civil rights actions under Oklahoma law is the two-year limitations period for "an action for injury to the rights of another"). Plaintiff's action arose in September 1990 when Plaintiff was terminated from his job as a Tulsa fire fighter. Moreover, Plaintiff's inmate status is an insufficient justification for tolling the statute of limitations in this case. The State of Oklahoma has no tolling provision for civil lawsuits filed by prisoners. See Hardin v. Straub, 490 U.S. 536, 540 n.8 (1989).

Accordingly, the Court concludes that Plaintiff's civil rights action must be **dismissed** as frivolous under 28 U.S.C. § 1915(d).

IT IS SO ORDERED.

This 17TH day of October, 1995.


Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

GARY E. STRICKLAND,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,¹)
)
Defendant.)

Case No: 94-C-999-W ✓

ENTERED ON DOCKET
DATE OCT 18 1995

JUDGMENT

Judgment is entered in favor of the Commissioner of Social Security in accordance with this court's Order filed October 12, 1995.

Dated this 17th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Consolidated Group Limited.,)
and Energy Consultants, Inc.)

Plaintiff,)

vs.)

ONYX INTERNATIONAL, INC.,)
DEPARTMENT OF NAVY, an agency of the)
United States of America, and)
THE SMALL BUSINESS ADMINISTRATION,)
an agency of the united States of America)

Defendants,)

ENTERED ON DOCKET

DATE OCT 18 1995

CASE NO. 95-C-603K

FILED

OCT 17 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

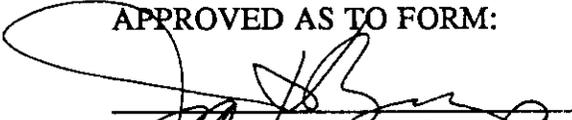
STIPULATION AND ORDER

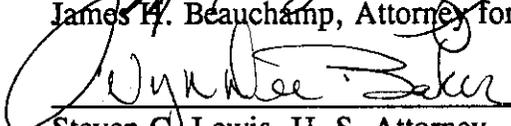
Pursuant to stipulation between the Plaintiffs and Defendants, Department of Navy, an Agency of the United State of America, and the Small Business Administration, an Agency of the United State of America, it is ordered that Defendants, Department of Navy, an Agency of the United State of America, and the Small Business Administration, an Agency of the United State of America be and hereby are dismissed from this litigation, without prejudice.

s/ TERRY C. KERN

U. S. District Court

APPROVED AS TO FORM:


James H. Beauchamp, Attorney for Plaintiffs


Steven C. Lewis, U. S. Attorney
by WynDee Baker, Assistant U. S. Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1995

HELEN SUE BROWN and)
JAMIE A. BROUSSARD,)
)
Plaintiffs,)
)
v.)
)
CITGO PETROLEUM CORPORATION,)
)
Defendant.)

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No. 94-C-717-B

**A M E N D E D
O R D E R**

ENTERED FOR THE COURT
DATE OCT 17 1995

For good cause shown, and counsel for Defendant having no objection, the Order heretofore entered on October 3, 1995, is hereby amended as to Count III only.

As to Count III, the wrongful discharge allegations are hereby dismissed with prejudice, but the allegations of disability discrimination are not dismissed.

DATED this 17 day of Oct., 1995.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT COURT JUDGE

Submitted by:
Pat Malloy, Jr.
MALLOY & MALLOY, INC.
1924 South Utica, Suite 810
Tulsa, Oklahoma 74104
Telephone: (918) 747-3491
ATTORNEYS FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

ROWDY JOE LAYTON,)
)
 Plaintiff,)
)
 v.)
)
 STEPHEN PECK, D.O.,)
)
 Defendant and)
 Third-Party Plaintiff,)
)
 v.)
)
 BAPTIST HEALTHCARE OF OKLAHOMA)
 INC., d/b/a BAPTIST REGIONAL)
 HEALTH CENTER,)
)
 Third-Party Defendant.)

Case No. 95-C-571-H
ENTERED ON DOCKET
DATE OCT 18 1995

FILED
OCT 17 1995
Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER

This matter comes before the Court on the Motion for Joinder of Baptist Healthcare of Oklahoma, Inc., d/b/a Baptist Regional Health Center (the "Hospital") as a Defendant and Motion to Amend Complaint to Add the Hospital as a Defendant or, in the Alternative, Motion to Realign the Hospital as a Defendant and Motion for Remand by Plaintiff Rowdy Joe Layton.

On June 21, 1995, Defendant Stephen Peck removed this action to this Court based upon the diversity of citizenship between Layton (a citizen of Oklahoma) and Peck (now a citizen of Texas). On or about July 21, 1995, Peck filed a Third-Party Complaint, asserting that Layton's damages were caused by the Hospital (a citizen of Oklahoma), and not by the alleged negligence of Peck. Based upon Peck's contention that the Hospital is responsible for Layton's injuries, Layton wishes to assert a direct claim against

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the Hospital. However, under the current procedural posture of the case, Layton is barred from suing the Hospital because it is not a diverse party.

Further, under Rule 14(a) of the Federal Rules of Civil Procedure, the Hospital is not a proper Third-Party Defendant. Rule 14(a) provides that:

[a]t any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff." (emphasis added).

Peck has asserted that the Hospital was negligent towards Layton, not towards himself. Thus, the Hospital is a proper Defendant in the action, and Peck may assert any claims it has against the Hospital by cross-claim.

The statute governing procedure after removal provides that:

[i]f after removal the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to State court.

28 U.S.C. § 1447(e) (1988). In determining whether to permit joinder, federal courts have relied upon an "equitable" analysis and have considered such factors as (1) the original defendant's interest in the federal forum, (2) the extent to which the purpose of the amendment is to defeat federal jurisdiction, (3) whether the plaintiff has diligently sought amendment, and (4) whether the plaintiff will be significantly injured if joinder is denied. See, e.g., Hensgens v. Deere & Co., 833 F.2d 1179, 1182 (5th Cir. 1987); Smith v. Arkansas Louisiana Gas Co., 157 F.R.D. 34, 35-36 (E.D.

Tex. 1994); St. Louis Trade Diverters, Inc. v. Constitution State Ins. Co., 738 F. Supp. 1269, 1270-71 (E.D. Mo. 1990).

Here, the application of these factors mandates joinder of the Hospital as a Defendant. Further, the Court notes that, as discussed above, the Hospital is an appropriate Defendant, rather than a Third-Party Defendant, in which case its liability to the Plaintiff would be derivative of Peck's liability to the Plaintiff.

First, Peck, although now a Texas citizen, was an Oklahoma resident in January 1994 when the injuries at issue occurred. By virtue of his former Oklahoma residency, he should not suffer prejudice in an Oklahoma state court. Second, the Court finds that Plaintiff has a good faith basis to join the Hospital as a Defendant and has not moved solely to defeat diversity jurisdiction. Third, Plaintiff has diligently sought to join the Hospital within thirty days of Peck's Third-Party Complaint filed against the Hospital. Finally, there is no doubt that Plaintiff will be significantly injured if he is unable to assert a claim against the Hospital, which entity is allegedly responsible for Plaintiff's injuries.

The Court finds that Layton must be allowed to assert his claims against the Hospital. Plaintiff's Motion for Joinder of the Hospital as a Defendant and Motion to Amend Complaint or, in the alternative, Motion to Realign the Hospital as a Defendant and

Motion for Remand (Docket # 10) is hereby granted. This action is hereby remanded to Oklahoma state court.

IT IS SO ORDERED.

This 17TH day of October, 1995.



Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

LOUISE PLAISTED,)
)
 Plaintiff,)
)
 v.)
)
 DEPARTMENT OF HEALTH AND HUMAN)
 SERVICES, Donna Shalala, Secretary,)
)
 Defendant.)

Case No. 89-C-0005-H

ENTERED ON DOCKET
DATE OCT 17 1995

O R D E R

Before the Court for consideration is the Report and Recommendation of the United States Magistrate Judge (Docket #43) (regarding Defendant's Motion to Dismiss (Docket # 38), Commissioner's Objection to Report and Recommendation, and Plaintiff's Response to Commissioner's Objection to Report and Recommendation). In the Report and Recommendation, the Magistrate Judge found that the Court has subject matter jurisdiction over this case and that Ms. Plaisted should be awarded widows' benefits for the period from 1987 to 1990.

When a party objects to the report and recommendation of a Magistrate Judge, Rule 72(b) of the Federal Rules of Civil Procedure provides in pertinent part that:

[t]he district judge to whom the case is assigned shall make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made in accordance with this rule. The district judge may accept, reject, or modify the recommendation decision, receive further evidence, or recommit the matter to the magistrate judge with instructions.

Based on a review of the Report and Recommendation of the Magistrate Judge and the Objection and Response thereto, the Court

hereby adopts and affirms the Report and Recommendation of the Magistrate Judge in part and declines to adopt the Report and Recommendation in part. As to the Magistrate Judge's finding of subject matter jurisdiction, the Court agrees that this case is properly before it. Therefore, in that respect, the Report and Recommendation which denies Defendant's Motion to Dismiss on the basis of subject matter jurisdiction, is adopted and affirmed. Defendant's Motion to Dismiss is hereby denied.

The Magistrate Judge also affirmed the January 29, 1992 decision of the Administrative Law Judge granting Plaintiff widow's benefits. With regard to the finding of the Administrative Law Judge that Plaintiff is entitled to benefits from January 1991 forward, the Court upholds the finding of the Administrative Law Judge.¹

With regard to the finding of the Administrative Law Judge that Plaintiff is entitled to widows' benefits from 1987 to 1990, however, the Court declines to adopt the recommendation of the Magistrate Judge awarding benefits. The Magistrate Judge stated:

Did the Commissioner err by denying widow's benefits between March 17, 1987 and February 28, 1990? The law to be applied during that time is outlined in Social Security Ruling 91-3p. Also, see, generally, Davidson v. Secretary Health and Human Services, 912 F.2d 1246 (10th Cir. 1990). Part of Ruling 91-3p reads:

If the application of the five-step sequential evaluation process results, at step five, in a finding that the widow is unable to engage in substantial gainful activity, an additional determination will be needed regarding the widow's entitlement to disability benefits for months prior to January 1991, i.e., her ability to engage in any gainful activity. SSA will make this

¹ Defendant does not dispute this finding of the Administrative Law Judge.

determination utilizing the residual functional capacity assessment used in conjunction with steps four and five of the sequential evaluation process, but without considering age, education, and work experience. (emphasis in original).

One reason for the remand was to allow the ALJ to examine the evidence in light of Social Security Ruling 91-3p. However, some of his findings suggest that he either did not apply the ruling or did not apprehend its full import. The ALJ clearly found that Ms. Plaisted was disabled as of March 13, 1987, but, in reaching that decision, he considered Ms. Plaisted's age, education and work experience -- something 91-3p prohibits. (emphasis in original). The ALJ also found that Ms. Plaisted could perform light work, which, in effect, means she can engage in gainful activity. As a result, the ALJ's decision was a "Catch 22" for Ms. Plaisted: **The decision was favorable but it appeared to be based on incorrect legal reasoning.**

Notwithstanding the Magistrate Judge's recognition that the decision of the Administrative Law Judge was flawed, the Magistrate Judge recommended upholding the decision and granting Ms. Plaisted benefits from 1987 to 1990. This Court declines to adopt the recommendation of the Magistrate Judge in this respect and, instead, remands the case to the Administrative Law Judge for clarification of his January 29, 1992 decision under applicable law.

Thus, the Court hereby adopts and affirms the Report and Recommendation in part, which has the effect of denying Defendant's Motion to Dismiss (Docket # 38), and declines to adopt and affirm the Report and Recommendation in part. The case is hereby remanded

to the Administrative Law Judge for clarification of his January 29, 1992 decision.

IT IS SO ORDERED.

This 16th day of December 1995.



Sven Erik Holmes
United States District Judge

FILED

OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

SOLOMON BROADUS,)
)
 Petitioner,)
)
 vs.)
)
 JACK COWLEY, et al.,)
)
 Respondents.)

Nos. 92-C-267-B
consolidated with
93-C-99-B

ENTERED ON DOCKET
DATE OCT 17 1995

ORDER

This matter comes before the Court on Petitioner's motion to dismiss this habeas corpus action without prejudice so that he can exhaust all available state remedies.

Having reviewed the motion, the Court concludes that the same should be granted. Accordingly, Petitioner's motion to dismiss is hereby **granted** and this consolidated habeas corpus action is hereby **dismissed without prejudice**. The Clerk shall mail to Petitioner for this time only a copy of his motion to dismiss without prejudice.

SO ORDERED THIS 17th day of oct., 1995.



THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

WILLIAM H. DAVIS, TRUSTEE OF THE)
JOE D. DAVIS REVOCABLE TRUST,)
)
Plaintiff,)
)
v.)
)
SONAT EXPLORATION COMPANY,)
)
Defendant.)

Case No. 94-C-828-H ✓

ENTERED ON DOCKET
DATE OCT 17 1995

O R D E R

This matter comes before the Court on a motion for summary judgment by Defendant Sonat Exploration Company ("Sonat") (Docket #17).

Plaintiff William H. Davis brought this action against Sonat alleging that Sonat breached the terms of a letter agreement between Sonat and Mr. Davis, in his capacity as trustee of the Joe D. Davis Revocable Trust. Mr. Davis contends that Sonat improperly terminated a letter of intent to purchase certain properties from Mr. Davis and that such termination violated Sonat's implied duty of good faith and fair dealing. He also asserts that Sonat's conduct was wanton, willful, grossly negligent and indicated a reckless disregard for his rights.

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c).

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In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). In Anderson, the Supreme Court stated:

The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

477 U.S. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986).

For purposes of this motion, the Court accepts as true certain allegations by Mr. Davis which are identified herein. As a result, the facts necessary to decide this motion, as determined from the record, are not in dispute.

The Agreement contained certain conditions which Sonat drafted with the express intent of protecting its interests. Specifically, paragraph 10(a) of the Agreement provides that "Sonat's obligation to purchase the properties from Seller shall be subject to . . . Sonat's satisfaction with the results of its full and complete due

diligence"

Because paragraph 10(a) renders its obligation to perform contingent upon its "satisfaction," Sonat claims that the provision allowed it to terminate the Agreement when it was dissatisfied with the results of its due diligence. Sonat asserts that it terminated the Agreement because its on-site inspections of the properties revealed potential environmental problems which could result in significant clean-up costs. By contrast, Mr. Davis alleges that Sonat's alleged basis for dissatisfaction was pretextual, and thus the resulting termination violated both the explicit terms of the Agreement and the implied duty of good faith and fair dealing.

Interpretation of the Agreement is governed by Oklahoma law. See United States v. Hardage, 985 F.2d 1427, 1433 (10th Cir. 1993). It is settled law that "Oklahoma jurisprudence recognizes the common-law notion that implied in every contract is a covenant of good faith and fair dealing." Devery Implement Co. v. J.I. Case Co., 944 F.2d 724, 728 (10th Cir. 1991) (citing Panama Processes v. Cities Serv. Co., 796 P.2d 276, 290 (Okla. 1990)). This implied covenant directs that a party cannot "'destroy or injure another party's right to receive the fruits of the contract.'" Id. (quoting Wright v. Fidelity & Deposit Co., 54 P.2d 1084, 1087 (Okla. 1936)). Davis asserts that Sonat breached this duty by declining to consummate the proposed transaction.

Although a duty of good faith is implicit in all contractual agreements, the parameters of the duty "must be viewed in relation to the type of transaction involved." Overbeck v. Quaker Life Ins.

Co., 757 P.2d 846, 849 (Okl. Ct. App. 1984) (no breach of the implied duty of good faith for terminating employee whose contract provided for at-will employment). Thus, if Sonat was exercising its explicit authority to terminate under the Agreement, it did not breach the implied duty of good faith. Therefore, the central issue here is whether Sonat's decision not to purchase the Davis properties resulted from a good faith dissatisfaction with its due diligence in accordance with the provisions of the Agreement.

The law recognizes two possible constructions of the term "satisfaction" as used in the instant contract:

Courts have observed that satisfaction clauses should fall into two categories of review: (1) those that call for satisfaction as to "commercial value or quality, operative fitness, or mechanical utility," which are interpreted under a reasonableness standard, and (2) those that require the consideration of a "multiplicity of factors" and involve "fancy, taste, or judgment," which should be analyzed under a good faith standard.

Misano di Navigazione, SpA v. United States, 968 F.2d 273, 275 (2d Cir. 1992) (citations omitted). In Ledford v. Wheeler, 620 P.2d 903 (Okl. Ct. App. 1980), the Oklahoma Court of Appeals utilized the "good faith" or subjective standard in construing a satisfaction clause. The clause at issue in Ledford allowed a prospective real estate buyer to cancel the transaction if his examination of the title proved unsatisfactory. The court held that "it was clearly intended and understood that the Buyer could only back out because of good faith concern about the title. While satisfaction was to be judged by the Buyer, this satisfaction was one determined in good faith and not by whim." Id. at 906.

While the Oklahoma court applied the good faith standard in Ledford, it failed either to articulate why it chose that standard or to address the possibility of using the alternative, reasonableness standard, under which the question is whether the decision to terminate was "reasonable" as a matter of law. Other courts, however, have explained the proper application of the good faith standard.

In Misano, the plaintiff entered into a contract with the federal government to transport a cargo of fuel oil. 968 F.2d 273. The government unilaterally canceled the contract upon the determination of its representative that plaintiff's ship was incapable of safely carrying the cargo. The Misano court held that a "multiplicity of factors" involved in the government's decision to terminate a shipping contract called for the application of a "good faith" standard. Id. at 275-76.

The California Supreme Court also applied a good faith standard in Mattei v. Hopper, 330 P.2d 625 (Cal. 1958) (en banc). Under the terms of the Mattei contract, the plaintiff's obligation to purchase land from the defendant was dependant upon his obtaining "satisfactory" leases. Id. at 626. The purchaser

only in "good faith." The court concluded that the "good faith" standard was applicable because "the factors involved in determining whether a lease is satisfactory to the lessor are too numerous and varied to permit the application of a reasonable[ness] standard." Id. The court noted that "[w]here the question is one of judgment, the promisor's determination that he is not satisfied, when made in good faith, has been held to be a defense to an action on the contract." Id. (citations omitted).

In Action Engineering v. Martin Marietta Aluminum, 670 F.2d 456 (3d Cir. 1982), a contractor brought an action for wrongful termination of a construction contract. The contract provided that "[i]f in Owner's opinion, contractor fails to carry on the work diligently and on schedule . . . Owner shall have the right . . . to terminate this contract forthwith." Id. at 457. The district court held that the defendant's termination of the contract was unreasonable. The Third Circuit reversed, concluding that "[defendant's] termination was within its contractual rights if [its] decision that [plaintiff] would not complete the contract on time was made in good faith." Id. at 460. The court applied the subjective standard because the defendant's decision to terminate the contract was based upon its weighing of a "'multiplicity of

only in "good faith." The court concluded that the "good faith" standard was applicable because "the factors involved in determining whether a lease is satisfactory to the lessor are too numerous and varied to permit the application of a reasonable[ness] standard." Id. The court noted that "[w]here the question is one of judgment, the promisor's determination that he is not satisfied, when made in good faith, has been held to be a defense to an action on the contract." Id. (citations omitted).

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The good faith standard applies in the instant case. Consistent with the holding in Ledford, this Court finds that Oklahoma law contemplates the application of the good faith or subjective standard in cases where a "multiplicity of factors" are

present. The record reveals that Sonat would have considered just such a "multiplicity of factors" in determining whether its was satisfied with its due diligence. Such factors included without limitation the potential environmental condition of each of the properties at issue, the cost of remedying existing and potential environmental damage and the extent of future potential environmental liability. The numerous factors entering into Sonat's decision compels this Court to examine the record and to apply a "good faith" standard in determining whether Sonat's withdrawal from the Agreement was permissible under its terms.

Sonat asserts that, as part of its due diligence, it conducted environmental and safety inspections of the properties and, according to Sonat, "[t]hese on-site inspections revealed poor maintenance of the properties and potential environmental liabilities." Def.'s Mot. for Summ. J. at 2. The record is undisputed that the properties were investigated by Sonat's operating personnel on June 10, 1994. Minor dep. at 50. In addition to written reports prepared by Sonat's investigators, a videotape of the properties was made on the same date. The record provides that Sonat's investigation reflected the following:

- a. Mattie Barnes Central Compressor Facility/Barnes 1-13 well. This facility and well are operated by the Trust. A heavy oil stain with sheen on standing water was observed in a 10' x 15' area around the compressor package. A diked water tank near the compressor appeared to contain a mixture of water and oil since stained oil was observed within the diked area. Apparently, this containment area had been periodically drained by a pipe/valve drain system, because stained soil was found leading from the tank containment drain system area and along natural drainage patterns off-site. Pools of standing water with oil sheens were noted at numerous

other parts of the location.

- b. The Barber 1-12 well. This well and location are operated by the Trust. A 10' x 10' area of oil-stained soil was found on location, apparently where a compressor once existed. Surface appearance and the absence of a pipeline connected to the water tank suggest that free liquids from the well have been repeatedly dumped on the ground. Alternatively, these liquids may be flowing into a pond off-site, as Sonat personnel observed a fabricated structure in the pond that appears to be some type of splash control, and continuous bubbles were observed at the entrance of this structure. All of the above suggests a discharge into this pond of some nature.
- c. Barrow 1-12 well. This well and location are operated by the Trust. Again, surface appearance (a 50' x 80' area of dead vegetation at the terminus of a pipe connected to the production unit) and the absence of a water tank indicate that produced liquids are being dumped on the ground.
- d. Rowland 1-33 well. This well and location are operated by Stephens Production Company. A 8' x 8' oil stain was found on location, apparently where a compressor once existed.
- e. Brant 1-11 well. This well and location are operated by Stephens Production Company. Surface appearance and the absence of a water tank indicate that produced liquids are being dumped on the ground.
- f. Charles Smith 1-18 well. This well and location are operated by Stephens Production Company. A 60' x 60' heavy oil stain was observed around the compressor. An oil sheen was visible on standing water in several areas of the location.
- g. Goodloe 1-23 well. This well and location are operated by Samson Resources company. A 6' x 6' oil stain was observed in the area of the compressor and water tank.

Def.'s Resp. to Interrog. 1, ¶¶ a-g.

It is undisputed that Sonat's field representatives prepared itemized reports of the potential costs of bringing three of the properties -- Barrow 1-12, Barber 1-12 and Mattie Barnes C.P. -- into compliance with Sonat's operating standards and estimated such

costs at \$52,865, \$55,415 and \$49,450, respectively. Hale mem., def.'s ex. 14.

David Minor, the Sonat employee responsible for making the final decision, Minor dep. at 47, testified that, as a result of the field inspection of the properties, he could not recommend to Sonat's senior management that Sonat complete the transaction. Id. at 49-50. Mr. Minor stated that his field representatives recommended to him -- both orally and in writing -- that Sonat not proceed with purchasing the properties. Id. at 68. He testified that he relied on the information he received from the field inspection, including the videotape, the cost assessments, and the written reports of his field inspectors, to make his own judgment as to the potential environmental liability that might exist at the properties. Id. at 85-86, 103. Mr. Minor specifically cited the videotape's portrayal of oil on the ground and the evidence that saltwater had been on the ground. Id. at 88. Mr. Minor received the final environmental reports on June 27, 1994, see Minor dep. at 108, and Sonat notified Mr. Davis of its decision to withdraw from the Agreement on June 30. Pl.'s Resp. to Def.'s Mot. for Summ. J., ex. 11.

By contrast, Mr. Davis claims that Sonat's expressed environmental concerns were pretextual. In his pleadings, he suggests three possible explanations why Sonat might have terminated the Agreement:

Sonat did not want to pursue the purchase because it had offered too much for the properties. Further, Sonat field personnel may have embellished the environmental concerns because they did not want to maintain and

operate the additional properties. Also, Sonat may have failed to finalize the transaction due to corporate politics.

Pl.'s Resp. to Def.'s Mot. for Summ. J. at 2. In support of this assertion, Mr. Davis relies primarily upon the deposition testimony of Jack Wheeler, a former Sonat employee.¹ Mr. Wheeler testified that the environmental concerns raised by Sonat's due diligence may not have been the reason it withdrew from the Agreement. He stated that

the only reason why the deal was not consummated was because David Minor was scared to go back to [Chairman of the Board] Russell after the discussion of the environmental concerns and admit that they were not as significant and a deal killer as what [Mr. Minor] represented initially.

¹Plaintiff also offers the testimony of an expert in environmental science, Thomas J. Anderson. Mr. Anderson asserts that "[n]one of the properties operated by the [Davis Trust] evidence any violations of any applicable environmental laws or regulations." Pl.'s Resp. to Def.'s Mot. for Summ. J., at exh. 2. The expert further opines that one of the Davis properties which was not operated by Davis could be brought up to industry standards for less than \$10,000. *Id.* These assertions, however, do nothing to contradict statements by Sonat that it estimated the costs of bringing the properties into compliance with Sonat's own environmental standards would be at least \$157,000. It is undisputed that Sonat believed these costs were necessary. Under applicable law, Sonat's good faith belief is the controlling factor in this Court's subjective inquiry, see Mattei v. Hopper, 330 P.2d 625, 626 (Cal. 1958), and Sonat's evidence as to its belief with respect to the clean-up costs is not contraverted by the opinion of plaintiff's expert regarding his estimated cost of compliance with environmental laws. Thus, there is no issue of material fact with respect to whether Sonat believed the total clean-up costs would exceed \$157,000.

Similarly, the Court discounts Mr. Davis' reliance upon the fact that Sonat rejected his offers to clean-up and/or indemnify Sonat for the environmental problems. See id. at 9. Because Sonat's subjective satisfaction is the proper focus of this motion, and Mr. Davis has not contraverted Sonat's assertion of genuine dissatisfaction, the reasonableness of Sonat's rejection of Mr. Davis' offer of indemnification is not legally significant.

Wheeler dep. at 20. Mr. Wheeler also asserted that another Sonat employee, Michael Lynch-Blosse, had expressed a view that the environmental concerns were "bogus" and that the Sonat personnel who conducted the due diligence were "puffing" and "expounding" because they did not want to operate some of the properties.² Id. at 60, 125.

Mr. Wheeler further stated, however, that he understood Sonat believed the cost of remedying the environmental problems would be \$157,000:

Q. Was it your understanding that the environmental aspects were the reasons for terminating the deal?

A. Yes.

Q. Did the \$160,000 figure, did you understand that was all costs to remedy environmental problems?

A. I understood it as being the costs to get it up to Sonat's standards, and I remember we had conversations where Michael Lynch-Blosse was trying to pin them down as to how much of that was to get it to minimum standards and how much of it was to get it to the Sonat way, but I never heard a dollar figure differentiated.

Q. Did you ever hear a dollar figure on what it would cost to remedy just the environmental problems and not the gap between environmental problems and Sonat's standards?

A. No. And, once again, I mean, in the memo they set standards and that is where I get that. It may be that it took the whole \$157,000 to get it to minimum standards. I just don't know.

Wheeler dep. at 195-96.

² Mr. Lynch-Blosse served as a business team leader of the Sonat business unit. "He was business development leader. He was the one who wanted to do the exploration. He was the driving force behind it." Wheeler dep. at 23. Even after Mr. Wheeler recommended that Sonat not pursue Davis' properties, Mr. Lynch-Blosse, alone, recommended that Sonat continue the purchase. Id. at 153-157.

More importantly, Mr. Wheeler stated that he believed the cost of remedying the environmental problems identified in the due diligence was so significant as to render the consummation of the transaction inadvisable, stating in applicable part as follows:

A. So I was concerned if you have a \$600,000 acquisition, and you have 200,000, or 160,000, or 157,000 liability, we shouldn't be doing the deal. And that was my gut feeling and that was my reaction.

Q. Did you communicate that to anybody at Sonat?

A. Yes, I told Minor that, and I told Michael Lynch-Blosse that, and I told Chris Furrh that.

Wheeler dep. at 152 (emphasis added).

Thus, the testimony is clear that Sonat's management believed that the cost of cleaning up the properties would be at least \$157,000. Furthermore, Mr. Wheeler testified that, based upon these clean-up estimates, he himself believed Sonat should terminate the Agreement. This view was the same as the position of Sonat and certainly sufficient to support the conclusion that Sonat was not "satisfied" under the terms of paragraph 10(a) of the Agreement and applicable law. Sonat's good faith is therefore evidenced by the fact that its conduct was consistent with the beliefs about the project expressed by the only individual who has questioned Sonat's motives in terminating the Agreement.

Sonat demonstrated with testimony and documentation the results of its due diligence. Sonat considered these results in reaching its determination that it was dissatisfied. Mr. Wheeler's speculation as to other possible reasons why Sonat did not consummate the deal is insufficient to defeat a summary judgment

motion when Mr. Wheeler himself has stated the view that the high cost of clean-up should terminate the deal.

The Court concludes that a review of the evidence considered by Sonat under the proper legal standard supports its position that it was not "satisfied" with its due diligence in accordance with paragraph 10(a) of the Agreement. Thus, Sonat did not breach either the explicit terms of the Agreement or its implied duty of good faith. The Court further concludes that Sonat's conduct, which was expressly contemplated by the Agreement, was not wanton, willful, or grossly negligent, nor did it indicate a reckless disregard for Mr. Davis' rights. Based on these conclusions and applying the legal standards set forth herein above, Sonat's motion for summary judgment is hereby granted (Docket #17).

IT IS SO ORDERED.

This 16TH day of October, 1995



Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

SAM MAJORS-HARDEE,)
)
 Plaintiff,)
)
 v.)
)
 STATE FARM FIRE AND CASUALTY)
 COMPANY, and STATE FARM GENERAL)
 INSURANCE COMPANY,)
)
 Defendants.)

Case No. 93-C-1050-H/

ENTERED ON DOCKET
DATE OCT 17 1995

ORDER

This matter comes before the Court on the Motion for Summary Judgment by State Farm Fire and Casualty Company and State Farm General Insurance Company (collectively, Defendants).

Summary judgment is appropriate where "there is no genuine issue as to any material fact," Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); Widon Third Oil & Gas Drilling Partnership v. Federal Deposit Insurance Corp., 805 F.2d 342, 345 (10th Cir. 1986), cert. denied, 480 U.S. 947 (1987), and "the moving party is entitled to judgment as a matter of law," Fed. R. Civ. P. 56(c). In Celotex, the Supreme Court stated:

[t]he plain language of Rule 56 (c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322.

A party opposing a properly supported motion for summary judgment must offer evidence, in admissible form, of specific facts, Fed. R. Civ. P. 56(e), sufficient to raise a "genuine issue

of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986) ("the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment") (emphasis in original). "Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

Summary judgment is only appropriate if "there is [not] sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." Id. at 250. The Supreme Court stated:

[t]he mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff.

Id. at 252. Thus, to defeat a summary judgment motion, the nonmovant "must do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585-86 (1986); Anderson, 477 U.S. at 250 ("there is no issue for trial unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. [citation omitted]. If the evidence is merely colorable, [citation omitted], or is not significantly probative, summary judgment may be granted.").

In essence, the inquiry for the Court is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Anderson, 477 U.S. at 250. In its review, the Court construes the record in the light most favorable to the party

opposing summary judgment. Boren v. Southwestern Bell Tel. Co., 933 F.2d 891, 892 (10th Cir. 1991).

The following facts in this case have been stipulated to by the parties and are not in dispute:

- On or about February 4, 1991, a Homeowner's policy of insurance was issued by State Farm General Insurance Company naming the Plaintiff and Robert Lee Lynch as co-insureds for real and personal property located at 3116 South Gary Place, Tulsa, Oklahoma.
- On or about November 26, 1991, a Personal Articles policy of insurance was issued by State Fire and Casualty Company to the Plaintiff for certain scheduled items of jewelry.
- On or about November 7, 1992, the Plaintiff reported to State Farm a theft loss from his home on November 6, 1992.
- On December 9, 1992, State Farm retained the services of Ms. Marlene Thomasson, an appraiser, to assist in an appraisal of the items claimed by the Plaintiff to have been stolen from his residence.
- On or about December 28, 1992, and December 30, 1992, respectively, the Plaintiff and Robert Lee Lynch submitted a Sworn Statement in Proof of Loss for the Homeowner's Policy in the amount of \$170,000.00, and the Plaintiff submitted a Sworn Statement in Proof of Loss for the Personal Articles Policy in the amount of \$35,161.00.
- On February 4, 1993, State Farm demanded that the Plaintiff submit to examination under oath as to the claims made under the Homeowners Policy and Personal Articles Policy. On March 15, 1993, and April 30, 1993, the Plaintiff submitted to examination under oath.

Defendants argue that Plaintiff is precluded from recovering under the above-referenced insurance policies because he has engaged in fraud and false swearing in the presentment of his

claims to State Farm. Okla. Stat. Ann. tit. 36 § 4803 (West Supp. 1995); see also Long v. Ins. Co. of North America, 670 F.2d 930 (10th Cir. 1982).

Based upon a review of the motion papers, however, the Court concludes that a genuine issue of material fact exists as to whether the Plaintiff has willfully misrepresented material facts with respect to the following: the alleged purchases from Belgium Antiques; the receipts from Hugo Russell & Co. Ltd.; the European receipts; the receipts from Scott's Custom Picture Framing, Inc.; the alleged purchases from River Oaks Antiques; and the painting allegedly purchased from the Lord Lenthall Antiques in Middlesex, England. The Court further concludes that genuine issues of material fact exist as to whether Plaintiff's testimony regarding his federal income tax returns and his mother constituted a willful fraud or false swearing under applicable law. Therefore, based on these conclusions, and applying the legal standard set forth herein, Defendants' Motion for Summary Judgment based upon alleged fraud and false swearing is hereby denied.

Defendants have alternatively moved for summary judgment on Plaintiff's bad faith claim. Because Plaintiff's allegations of bad faith are based on Defendants' denial of coverage due to the various confused and allegedly misleading representations by Plaintiff in connection with his claim, and because this Court's review of the pleadings and other documents and statements of the parties reveal a genuine issue of fact as to the nature and significance of these representations, the Court finds that summary

judgment in favor of Defendants on the bad faith claim is appropriate. Therefore, Defendants' Motion for Partial Summary Judgment on Plaintiff's claim of bad faith is hereby granted.

IT IS SO ORDERED.

This 16TH day of October, 1995.



Sven Erik Holmes
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

CATHY SULLINS,)
)
 Plaintiff,)
)
 vs.)
)
 MARK HENSON, individually, and as)
 an employee and representative of)
 The United States Junior Chamber)
 of Commerce; STEPHEN LAWSON,)
 individually, and as an employee)
 and representative of the United)
 States Junior Chamber of Commerce;)
 GARY TOMPKINS, individually, and)
 as an employee and representative)
 of the United States Junior)
 Chamber of Commerce; and THE)
 UNITED STATES JUNIOR CHAMBER)
 OF COMMERCE, a Missouri)
 corporation,)
)
 Defendants.)

Case No. 95-C-804-B ✓

ENTERED ON DOCKET

DATE 10-17-95

FILED

OCT 17 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

O R D E R

Before the Court are a Motion to Dismiss for failure to state a claim (Docket #3) filed by Defendants Mark Henson, Stephen Lawson and Gary Tompkins; and a Motion to Dismiss for failure to state a claim (Docket #2) filed by Defendant United States Junior Chamber of Commerce.

Plaintiff Cathy Sullins ("Sullins") alleges hostile work environment and quid pro quo sexual harassment and sexual discrimination, in violation of Title VII of the Civil Rights Act of 1964; sexual discrimination and harassment in violation of Oklahoma's Anti-Discrimination Act, 25 O.S. § 1302 ("OADA"); intentional infliction of emotional distress; constructive discharge; and tortious breach of contract. Defendants Mark

Henson, Stephen Lawson and Gary Tompkins ("the individual defendants") move to dismiss the Title VII claims as to them individually, alleging that Title VII does not allow recovery against them in their individual capacities. They also move to dismiss the OADA claim, alleging that the OADA does not allow a private right of action for gender discrimination. Defendant United States Junior Chamber of Commerce moves to dismiss the OADA claim against it on the same grounds.

To dismiss a complaint for failure to state a claim upon which relief can be granted it must appear beyond doubt that Plaintiff can prove no set of facts in support of the claim that would entitle relief. Conley v. Gibson, 355 U.S. 41 (1957). Motions to dismiss under Rule 12(b)(6) admit all well-pleaded facts. Jones v. Hopper, 410 F.2d 1323 (10th Cir. 1969), *cert. denied*, 397 U.S. 991 (1970). The allegations of the Complaint must be taken as true and all reasonable inferences from them must be indulged in favor of the complainant. Olpin v. Ideal National Ins. Co., 419 F.2d 1250 (10th Cir. 1969), *cert. denied*, 397 U.S. 1074 (1970).

The Court first addresses the individual defendants' claim that Title VII does not allow recovery against them in their individual capacities. The Tenth Circuit Court of Appeals stated in Sauers v. Salt Lake County, 1 F.3d 1122 (10th Cir. 1993), that

Under Title VII, suits against individuals must proceed in their official capacity; individual capacity suits are inappropriate. 'The relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act. We think the proper method for a

plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly.' [emphasis in original]

Id. at 1125, *citing* Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991).

In May 1995, however, after an extensive study of the split among circuits and among precedent in this circuit, the Tenth Circuit stated that this issue is an "open question" here. Ball v. Renner, 54 F.3d 664 (10th Cir. 1995). In Ball, the Tenth Circuit contrasted Sauers with Brownlee v. Lear Siegler Management Servs. Corp., 15 F.3d 976 (10th Cir. 1994), which stated that "a principal's status as an employer can be attributed to its agent to make the agent statutorily liable for his own age-discriminatory conduct", which indicates that personal liability does exist on the part of the agent in the Tenth Circuit. Ball, 54 F.3d at 668.¹ Ball, however, did not resolve the issue; instead, it found that the individually named defendant could not be found to be an "employer" because he lacked supervisor or managerial authority over the plaintiff. Ball, 54 F.3d at 667. Therefore, according to

¹Several courts have noted the split of authority in the Tenth Circuit. See U.S. EEOC v. AIC Security Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995). The court in Lynam v. Foot First Podiatry Centers, 886 F. Supp. 1443 (N.D. Ill. 1995), used the Tenth Circuit as an example of a circuit in which "there is no clear consensus". The Lynam court, in noting the Sauers/Brownlee dichotomy described in Ball, stated, "if the Ball opinion represents the current inclination of the Tenth Circuit, then it would appear that the Tenth Circuit is now leaning toward recognizing individual liability under Title VII thus deepening the divide between the circuits." Id. at 1446.

Ball, the question remains open in the Tenth Circuit whether a "supervisory" employee may be individually liable under Title VII.

Although Ball strongly suggests that the Brownlee-type cases in other circuits are the better view, such indications are merely dicta. Further, even Brownlee does not specifically hold that employees are individually liable under Title VII; rather, Brownlee merely holds that a principal's discriminatory animus may not be imputed to its innocent agents. Brownlee, 15 F.3d at 978. Even if Brownlee purported to directly overrule Sauers, it could not do so because a Court of Appeals panel "is bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court." United States v. Killion, 7 F.3d 927, 930 (10th Cir. 1993). See also United States v. Smith, 63 F.3d 956 (10th Cir. 1995). As further evidence of Sauers' continuing viability, the Court notes that the Tenth Circuit applied Sauers to dismiss a Title VII claim against an individual, more than four months after Brownlee was decided. See Lankford v. City of Hobart, 27 F.3d 477 (10th Cir. 1994) ("...Title VII applies only to an *employer*, in this case the City of Hobart, see Sauers" [emphasis in original]). Until the Tenth Circuit provides a clearer and more direct indication that Sauers has been overruled, this Court holds that Sauers remains good law. Therefore, Plaintiff's Title VII claims against the individual defendants in their individual capacities are hereby dismissed.

The Court next address Defendants' contention that the OADA does not afford a private right of action for gender discrimination

according to Tate v. Browning-Ferris, Inc., 833 P.2d 1218, 1229 (Okla. 1992), and Williams v. Dub Ross Co., 895 P.2d 1344, 1346 (Okla. App. Ct. 1995). Plaintiff Sullins alleges that these cases are distinguishable because they deal with the issue of whether the OADA recognizes a private right of action for race discrimination, not gender discrimination.

Tate and Williams clearly state that the OADA recognizes a private right of action only for handicap discrimination. "Further, while a *private* right of action is provided to persons aggrieved by racially discriminatory practices under Title VII (42 U.S.C. § 2000e-5), under Oklahoma anti-discrimination law (25 O.S.1991 §§ 1101 *et seq.*), a private right of action is afforded only for discrimination based on handicap." Williams, 895 P.2d at 1346, *citing Tate*, 833 P.2d at 1229 (emphasis in original). *See also Katzer v. Baldor Elec. Co.*, 969 F.2d 935 (10th Cir. 1992) ("The Act did not create private cause of action until a new section was adopted on September 1, 1990. The new section, Okla.Stat. Ann. tit. 24 § 1901, specifically created a private cause of action for a party alleging handicap discrimination"). Oklahoma law is clear that the OADA provides a private right of action solely for claims of handicap discrimination.

Both Motions to Dismiss are granted.

IT IS SO ORDERED this 17 day of October, 1995.


THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

MONSI L'GGRKE,)
)
 Plaintiff,)
)
 v.)
)
 CITY OF TULSA, et al.,)
)
 Defendants.)

Case No. 94-C-1004-H ✓

ENTERED ON DOCKET

DATE OCT 17 1995

J U D G M E N T

This matter came before the Court on a motion to dismiss by Defendants. The Court duly considered the issues and rendered a decision in accordance with the order filed on October 16, 1995.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Defendants and against the Plaintiff.

IT IS SO ORDERED.

This 16TH day of October, 1995.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 RONALD KEVIN MARQUETTE aka)
 KEVIN MARQUETTE; KAREN)
 MARQUETTE; BENEFICIAL)
 MORTGAGE COMPANY OF)
 OKLAHOMA; CITY OF GLENPOOL,)
 Oklahoma; COUNTY TREASURER,)
 Tulsa County, Oklahoma; BOARD OF)
 COUNTY COMMISSIONERS, Tulsa)
 County, Oklahoma,)
 Defendants.)

FILED
OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET
DATE OCT 17 1995

Civil Case No. 95-C 735B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of Oct., 1995.

The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, RONALD KEVIN MARQUETTE aka KEVIN MARQUETTE, KAREN MARQUETTE, BENEFICIAL MORTGAGE COMPANY OF OKLAHOMA, and CITY OF GLENPOOL, Oklahoma, appear not, but make default.

The Court being fully advised and having examined the court filed finds that the Defendant, RONALD KEVIN MARQUETTE aka KEVIN MARQUETTE will hereinafter be referred to as ("RONALD KEVIN MARQUETTE"). The Defendants, RONALD KEVIN MARQUETTE and KAREN MARQUETTE are husband and wife.

NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNTRIES AND
PRO SE LITIGANTS BY FIRST CLASS
UPON RECEIPT.

The Court being fully advised and having examined the court file finds that the Defendant, RONALD KEVIN MARQUETTE, waived service of Summons on August 28, 1995; that the Defendant, KAREN MARQUETTE, waived service of Summons on August 28, 1995; that the Defendant, BENEFICIAL MORTGAGE COMPANY OF OKLAHOMA, acknowledged receipt of Summons and Complaint via certified mail on August 7, 1995; and that the Defendant, CITY OF GLENPOOL, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on August 7, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on September 5, 1995; and that the Defendants, RONALD KEVIN MARQUETTE, KAREN MARQUETTE, BENEFICIAL MORTGAGE COMPANY OF OKLAHOMA, and CITY OF GLENPOOL, Oklahoma, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

LOT THREE (3), BLOCK THREE (3), KENDALWOOD
ESTATES ADDITION II, AN ADDITION IN THE TOWN
OF GLENPOOL, TULSA COUNTY, STATE OF
OKLAHOMA, ACCORDING TO THE RECORDED PLAT
THEREOF.

The Court further finds that on March 27, 1981, David E. Hadley and Sandra L. Hadley, executed and delivered to FIRST CONTINENTAL MORTGAGE CO. their

mortgage note in the amount of \$38,000.00, payable in monthly installments, with interest thereon at the rate of fourteen percent (14%) per annum.

The Court further finds that as security for the payment of the above-described note, David E. Hadley and Sandra L. Hadley, Husband and Wife, executed and delivered to FIRST CONTINENTAL MORTGAGE CO. a mortgage dated March 27, 1982, covering the above-described property. Said mortgage was recorded on March 31, 1981, in Book 4535, Page 1550, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 14, 1982, FIRST CONTINENTAL MORTGAGE CO. assigned the above-described mortgage note and mortgage to SECURITY PACIFIC MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on November 1, 1982, in Book 4647, Page 1215, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 9, 1985, SECURITY PACIFIC MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to MANUFACTURERS HANOVER MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on December 18, 1985, in Book 4913, Page 1130, in the records of Tulsa County, Oklahoma.

The Court further finds that on February 16, 1990, FIREMAN'S FUND MORTGAGE CORPORATION FKA MANUFACTURERS HANOVER MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors and assigns. This Assignment of Mortgage was recorded on March 1, 1990, in Book 5238, Page 1980, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, RONALD KEVIN MARQUETTE and KAREN MARQUETTE, are the current tile owners of the property by virtue of a General Warranty Deed dated September 18, 1981, and recorded on September 24, 1991, in Book 4570, Page 2025 in the records of Tulsa County, Oklahoma. A corrected Warranty Deed was recorded on October 8, 1981, in Book 4575, Page 91, in the records of Tulsa County, Oklahoma. The Defendants, RONALD KEVIN MARQUETTE and KAREN MARQUETTE, are the current assumptors of the subject indebtedness.

The Court further finds that on February 1, 1990, the Defendants, RONALD KEVIN MARQUETTE and KAREN MARQUETTE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. A superseding agreement was reached between these same parties on January 1, 1991 and May 14, 1992.

The Court further finds that on August 31, 1992 the Defendants, RONALD KEVIN MARQUETTE and KAREN MARQUETTE, filed their petition for Chapter 7 relief in United States Bankruptcy Court for the Northern District of Oklahoma, case number 92-3070W. The abstract further shows that the property which is the subject matter of this foreclosure action was scheduled in the bankruptcy. This case was discharged on December 28, 1992, and was subsequently closed on April 7, 1993.

The Court further finds that the Defendants, RONALD KEVIN MARQUETTE and KAREN MARQUETTE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, RONALD KEVIN MARQUETTE and

KAREN MARQUETTE, are indebted to the Plaintiff in the principal sum of \$55,288.40, plus interest at the rate of 14 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$38.00 which became a lien on the property as of June 26, 1992. Said lien is inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, RONALD KEVIN MARQUETTE, KAREN MARQUETTE, BENEFICIAL MORTGAGE COMPANY OF OKLAHOMA, and CITY OF GLENPOOL, Oklahoma, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, RONALD KEVIN MARQUETTE and KAREN MARQUETTE, in the principal sum of \$55,288.40, plus interest at the rate of 14 percent per annum from May 1, 1995 until judgment, plus

interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$38.00, plus costs and interest, for personal property taxes for the year 1991, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, RONALD KEVIN MARQUETTE, KAREN MARQUETTE, BENEFICIAL MORTGAGE COMPANY OF OKLAHOMA, CITY OF GLENPOOL, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, RONALD KEVIN MARQUETTE and KAREN MARQUETTE, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$38.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

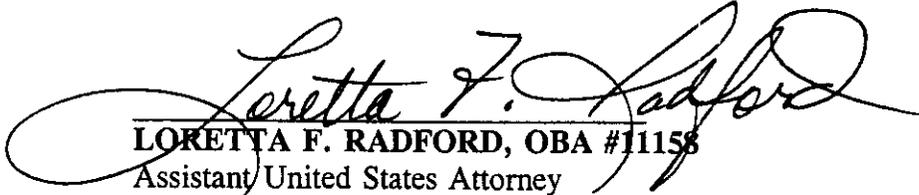
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842

Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 735B

LFR/lg

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 LESLIE T. GILMORE; SHARZADA M.)
 GILMORE; UNKNOWN SPOUSE OF)
 Leslie T. Gilmore, if any; UNKNOWN)
 SPOUSE OF Sharzada M. Gilmore, if)
 any; STATE OF OKLAHOMA, ex rel.)
 OKLAHOMA EMPLOYMENT)
 SECURITY COMMISSION; COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

FILED

OCT 17 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 17 1995

Civil Case No. 95-C 381B

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 17 day of Oct.,
1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern
District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the
Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY
COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant
District Attorney, Tulsa County, Oklahoma; the Defendant, STATE OF OKLAHOMA, ex
rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, appears not having
previously filed a Disclaimer; and the Defendants, LESLIE T. GILMORE, SHARZADA M.
GILMORE, UNKNOWN SPOUSE OF Leslie T. Gilmore, if any and UNKNOWN SPOUSE
OF Sharzada M. Gilmore, if any, appear not, but make default.

NOTE: THIS COURT IS TO BE MAILED
BY 10:00 AM ON ALL DOCKETED AND
FILED CASES. IT IS EMPLOYER'S
RESPONSIBILITY.

The Court being fully advised and having examined the court file finds that the Defendant, LESLIE T. GILMORE, signed a Waiver of Summons on May 24, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, was served a copy of Summons and Complaint on May 1, 1995, by Certified Mail.

The Court further finds that the Defendants, SHARZADA M. GILMORE, UNKNOWN SPOUSE OF Leslie T. Gilmore, if any and UNKNOWN SPOUSE OF Sharzada M. Gilmore, if any, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning August 8, 1995, and continuing through September 12, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, SHARZADA M. GILMORE, UNKNOWN SPOUSE OF Leslie T. Gilmore, if any and UNKNOWN SPOUSE OF Sharzada M. Gilmore, if any, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, SHARZADA M. GILMORE, UNKNOWN SPOUSE OF Leslie T. Gilmore, if any and UNKNOWN SPOUSE OF Sharzada M. Gilmore, if any. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds

that the Plaintiff, United States of America, acting through the Department of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on May 11, 1995; that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, filed its Disclaimer on May 11, 1995; and that the Defendants, LESLIE T. GILMORE, SHARZADA M. GILMORE, UNKNOWN SPOUSE OF Leslie T. Gilmore, if any and UNKNOWN SPOUSE OF Sharzada M. Gilmore, if any, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendants, SHARZADA M. GILMORE and LESLIE T. GILMORE, were granted a Divorce on July 8, 1991, in Case No. FD 91-04567, in Tulsa County District Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lots Ten (10), Eleven (11), and Twelve (12), Block Eight (8), ORIGINAL TOWN OF TURLEY, Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on April 29, 1988, the Defendants, LESLIE T. GILMORE and SHARZADA M. GILMORE, executed and delivered to HARRY MORTGAGE CO., their mortgage note in the amount of \$24,800.00, payable in monthly installments, with interest thereon at the rate of Ten and One-Half percent (10.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, LESLIE T. GILMORE and SHARZADA M. GILMORE, husband and wife, executed and delivered to HARRY MORTGAGE CO., a mortgage dated April 29, 1988, covering the above-described property. Said mortgage was recorded on May 2, 1988, in Book 5096, Page 1683, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 3, 1988, HARRY MORTGAGE CO., assigned the above-described mortgage note and mortgage to UFS MORTGAGE COMPANY. This Assignment of Mortgage was recorded on May 16, 1988, in Book 5099, Page 1748, in the records of Tulsa County, Oklahoma.

The Court further finds that on May 13, 1988, UFS MORTGAGE COMPANY, assigned the above-described mortgage note and mortgage to UNITED SAVINGS BANK. This Assignment of Mortgage was recorded on July 11, 1988, in Book 5113, Page 1119, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 25, 1989, UNITED SAVINGS BANK, assigned the above-described mortgage note and mortgage to SECRETARY OF HOUSING AND URBAN DEVELOPMENT. This Assignment of Mortgage was recorded on October 3, 1989, in Book 5211, Page 441, in the records of Tulsa County, Oklahoma. A

Corrected Assignment was recorded on January 2, 1990, in Book 5228, Page 1253, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 15, 1989, the Defendants, LESLIE T. GILMORE and SHARZADA M. GILMORE, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, LESLIE T. GILMORE and SHARZADA M. GILMORE, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreement, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, LESLIE T. GILMORE and SHARZADA M. GILMORE, are indebted to the Plaintiff in the principal sum of \$39,891.98, plus interest at the rate of 10.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$9.00 which became a lien on the property as of June 26, 1992, a lien in the amount of \$1.00 which became a lien on the property as of June 25, 1993, and a lien in the amount of \$1.00 which became a lien on the property as of June 23, 1994, plus accruing costs and interest. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, LESLIE T. GILMORE, SHARZADA M. GILMORE, UNKNOWN SPOUSE OF Leslie T. Gilmore, if any and

UNKNOWN SPOUSE OF Sharzada M. Gilmore, if any, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that the Defendant, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, Disclaims any right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment In Rem against the Defendants, LESLIE T. GILMORE and SHARZADA M. GILMORE, in the principal sum of \$39,891.98, plus interest at the rate of 10.5 percent per annum from January 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$11.00, plus accruing costs and interest, for personal property taxes for the years 1991, 1992 and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, STATE OF OKLAHOMA, ex rel. OKLAHOMA EMPLOYMENT SECURITY COMMISSION, LESLIE T. GILMORE, SHARZADA M. GILMORE, UNKNOWN SPOUSE OF Leslie T. Gilmore, if any and UNKNOWN SPOUSE OF Sharzada M. Gilmore, if any, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, LESLIE T. GILMORE and SHARZADA M. GILMORE, to satisfy the judgment In Rem of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$11.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

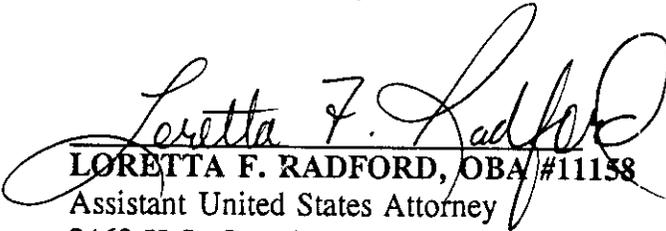
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ THOMAS R. BRETT

UNITED STATES DISTRICT JUDGE

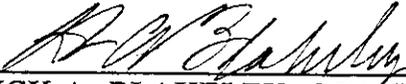
APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11138

Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852

Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95 C 381B

LFR:flv

IN THE UNITED STATES DISTRICT COURT IN AND FOR THE
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

NORMA CALHOUN,

Plaintiff,

vs.

LIVING CENTERS OF AMERICA,
INC., a foreign corporation;
and LIVING CENTERS OF TEXAS,
INC., a foreign corporation,
d/b/a REGENCY PARK NURSING
HOME; FLORENCE ALEXANDER,

Defendants.

DATE OCT 17 1995

Case No. 94-C-628-H

FILED
IN OPEN COURT

OCT 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

It appearing to the Court that pursuant to Fed. R. Civ. P. 41(a)(1) the parties have stipulated to dismiss the second and third causes of action of the above-entitled action.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the second and third causes of action of Plaintiff's Petition be, and the same is, hereby dismissed, without cost to either party and without prejudice to Plaintiff.

IT IS SO ORDERED dated this 16TH day of October, 1995.


UNITED STATES DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HOMER W. TATE)
SS# 440-46-3315,)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner,)
Social Security Administration,)
Defendant.)

NO. 94-C-576-M

FILED

OCT 17 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET
DATE OCT 17 1995

JUDGMENT

Judgment is hereby entered for the Defendant and against Plaintiff. Dated this 16th day
of OCT., 1995.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

8

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HOMER W. TATE)
SS# 440-46-3315,)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner, ¹)
Social Security Administration,)
Defendant.)

NO. 94-C-576-M

FILED

OCT 16 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

DATE OCT 17 1995

ORDER

Plaintiff, Homer W. Tate, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing a decision of the Secretary under 42 USC § 405(g) is well-settled. The court is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Plaintiff's September 23, 1992 application for disability benefits was denied November 30, 1992, the denial was affirmed on reconsideration, February 24, 1992. A hearing before an Administrative Law Judge ("ALJ") was held September 8, 1992. By decision dated October 18, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on April 1, 1994. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

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that of the Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the relevant facts of this case and has properly outlined the required sequential analysis. The Court therefore incorporates this information into this order as the duplication of this effort would serve no useful purpose.

Plaintiff alleges that the record does not support the determination of the Secretary by substantial evidence. Specifically, Plaintiff claims that the record does not support the determination that Plaintiff can perform light work and that the hypothetical question to the vocational expert did not accurately relate all of Plaintiff's impairments.

Plaintiff was severely injured in an automobile accident which, according to the medical record, occurred July 30, 1989 [R. 191]. Plaintiff claimed that he has continuing leg pain as the result of this accident and that he has a vision and hearing problem that prevent him from working.

The Court finds that the ALJ's determination that Plaintiff can perform work at the light exertional level is supported by substantial evidence. The record reflects that on September 5, 1989, Dr. Alan Holderness, the orthopedic surgeon treating Plaintiff after his accident, estimated that Plaintiff would be off work until January 1 [R. 235]. On March 27, 1990, Dr. Holderness advised Plaintiff to "find lighter work type" [R. 233]. On May 20, 1990 the doctor documented

"No light duty. Part-time work with brother" [R. 232]. The ALJ interpreted the May 20 entry as meaning "that no such [light] work was available and, conceivably that the claimant was only working part-time with his brother." [R. 24]. The Court agrees with the ALJ's interpretation of that note. These notes from Plaintiff's treating physician reflect the orthopedic surgeon's belief that as early as eight months after his accident, Plaintiff was capable of at least performing some work, although at a lighter level than his former work which was at the medium exertional level [R.63]. The examining physician indicated Plaintiff was only able to walk two blocks without an assistive device [R. 273]. However, Plaintiff's own testimony established his ability to walk almost a mile [R. 51]. The ALJ's finding that Plaintiff can perform light work is supported by substantial evidence.

Plaintiff contends that the ALJ improperly relied upon the Vocational Expert's response to a hypothetical that did not address his hearing loss. Testimony elicited by hypothetical questions that do not relate with precision all of a claimant's impairments cannot constitute substantial evidence to support the Secretary's decision. *Hargis v. Sullivan*, 945 F.2d 1482, 1492 (10th Cir. 1991). However, in posing a hypothetical question, the ALJ need only set forth those physical and mental impairments which are accepted as true by the ALJ. See *Talley v. Sullivan*, 908 F.2d 585, 588 (10th Cir. 1990). In that regard, the ALJ noted Plaintiff's apparent ability to hear the ALJ during the hearing and that the examining physician observed Plaintiff was able to hear him adequately without the need to repeat anything [R. 22, 23]. In addition, the record contained a report where a disability examiner contacted Plaintiff by telephone to secure additional information concerning his claim. The disability examiner reports "Claimant was able to understand questions and responded quite well. About 5 minutes into telephone

conversation, claimant asked examiner to speak to his wife because 'he had a hearing problem'. His voice did have a nasal quality to it but was easily understood and no apparent hearing difficulty noted." [R. 130]. Based on this information the ALJ recognized Plaintiff's hearing loss but determined that it did not significantly limit the claimant's ability to perform work. The Court finds this determination to be supported by substantial evidence. As a result, the Court finds that the ALJ's hypothetical summarizing claimant's residual functional capacity was correct.

The Court finds that the ALJ evaluated the record in accordance with the correct legal standards established by the Secretary and the courts. The Court finds that there is substantial evidence in the record to support the ALJ's decision. Accordingly, the decision of the Secretary finding Plaintiff not disabled is AFFIRMED.

SO ORDERED THIS 14th day of OCT., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HERBERT ROBERTS)
SS# 444-38-0255,)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner, ¹)
Social Security Administration,)
Defendant.)

NO. 93-C-1136-MV

FILED

OCT 17 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ENTERED ON DOCKET

DATE OCT 17 1995

ORDER

Plaintiff, Herbert Roberts, seeks judicial review of a decision of the Secretary of Health & Human Services denying Social Security disability benefits.² In accordance with 28 U.S.C. §636(c) the parties have consented to proceed before a United States Magistrate Judge, any appeal of this decision will be directly to the Circuit Court of Appeals.

The role of the court in reviewing the decision of the Secretary under 42 USC § 405(g) is to determine whether there is substantial evidence in the record to support the decision of the Secretary, and not to reweigh the evidence or try the issues *de novo*. *Sisco v. U.S. Dept. of Health and Human Services*, 10 F.3d 739, 741 (10th Cir. 1993). In order to determine whether the Secretary's decision is supported by substantial evidence, the court must meticulously examine the record. However, the court may not substitute its discretion for that of the

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. However, this Order continues to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Plaintiff's November 8, 1991 application for disability benefits was denied March 17, 1992, the denial was affirmed on reconsideration, July 28, 1992. A hearing before an Administrative Law Judge ("ALJ") was held December 14, 1992. By decision dated February 26, 1993 the ALJ entered the findings that are the subject of this appeal. The Appeals Council affirmed the findings of the ALJ on July 30, 1993. The decision of the Appeals Council represents the Secretary's final decision for purposes of further appeal. 20 C.F.R. §§ 404.981, 416.1481.

Secretary. *Musgrave v. Sullivan*, 966 F.2d 1371, 1374 (10th Cir. 1992). If supported by substantial evidence, the Secretary's findings are conclusive and must be affirmed. *Richardson v. Perales*, 402 U.S. 389, 390, 91 S.Ct. 1420, 1422, 28 L.Ed.2d 842, (1971). Substantial evidence is more than a scintilla, less than a preponderance, and is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Id.* at 401, 91 S.Ct. at 1427.

The undersigned United States Magistrate Judge finds that the Administrative Law Judge ("ALJ") has adequately and correctly set forth the relevant facts of this case and has properly outlined the required sequential analysis. The Court therefore incorporates this information into this Order as the duplication of this effort would serve no useful purpose.

Plaintiff alleges that the ALJ failed to consider the combined effect of Plaintiff's alleged impairments, failed to properly evaluate Plaintiff's alcoholism and improperly rejected the opinion of Plaintiff's treating physician. Additionally in an attempt to support his claims, Plaintiff appended to his brief medical records which were not before the ALJ. Because it is necessary to reverse and remand this case, the Court will only address the issue requiring reversal.

A treating physician may offer an opinion which reflects a judgment about the nature and severity of the claimant's impairments including the claimant's symptoms, diagnosis, prognosis, and any physical and mental restrictions. See 20 C.F.R. §§ 404.1527(a)(2), 416.927(a)(2). The Secretary will give controlling weight to that type of opinion if it is well supported by clinical and laboratory diagnostic techniques and if it is not inconsistent with other substantial evidence in the record. 20 C.F.R. §§ 404.1527(d)(2), 416.927(d)(2). A treating physician's opinion may be rejected if it is brief, conclusory and unsupported by medical evidence. Specific, legitimate

reasons for rejection of the opinion must be set forth by the ALJ. *Frey v. Bowen*, 816 F.2d 508 (10th Cir. 1987). Although a physician may proffer an opinion that a claimant is totally disabled, that opinion is not dispositive because final responsibility for determining the ultimate issue of disability is reserved to the Secretary. See 20 C.F. R. §§ 404.1527(e)(2), 416.927(e)(2); *Castellano v. Secretary of Health and Human Services*, 26 F.3d 1027, 1028 (10th Cir. 1994), *Eggleston v. Bowen*, 851 F.2d 1244, 1246-7 (10th Cir. 1988) (if treating physician's progress notes contradict his opinion, it may be rejected).

Louis Bamberl, Jr., M.D. testified that he has been treating Plaintiff since 1985 for a variety of illnesses. Dr. Bamberl noted that Plaintiff is suffering from gastric ulcers which have been severely bleeding at times, aseptic necrosis of both hips which was confirmed by X-ray, arthritis in the hands and degenerative arthritis in the spine, advanced emphysema and asthma, cirrhosis of the liver, diabetes (which is controlled by diet), alcoholism, and black-out spells which the doctor opined could be caused either by the severe trauma which Plaintiff received to his head in a 1981 assault, by his alcohol abuse, or by low blood oxygen brought about by his chronic obstructive pulmonary disease which does not respond well to broncodilators when exacerbated by coughing [R. 65-70]. Dr. Bamberl also noted that it was very difficult to treat Plaintiff's various illnesses because the treatment regimen for one of his problems would cause additional deterioration of another of Plaintiff's illnesses [R. 68]. Based upon his years of treatment of Plaintiff and the combined effect of all of Plaintiff's medical illnesses, Dr. Bamberl expressed the opinion that Plaintiff is totally incapable of working at anything to make a living.

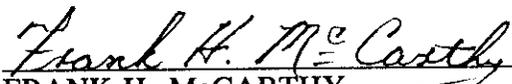
In addition to this testimony by his treating physician, the ALJ had before him the consultive report of Robert C. Harris, M.D. After examining Plaintiff, the consultive physician assessed Plaintiff as having headache post-traumatic, probable liver disease probably secondary to ethanol use, chronic obstructive lung disease with an asthma component, Type II diabetes, partial visual compromise of the left eye secondary to trauma, and diffuse arthritis particularly involving the lower back and hips. The consultive physician's assessment was:

Patient's function is limited by his inability to maintain any one position for more than twenty to thirty minutes without becoming quite uncomfortable. There is also some visual compromise. This is felt to be secondary to trauma. The patient underwent a pulmonary function testing. A full report is accompanying [the report reflects severe obstructive lung disease with no significant improvement post bronchodilator therapy [R. 233]]. There is evidence of moderate to severe obstructive lung disease [R. 228].

The consulting physician's assessment and the remainder of the medical records fully supported the treating physician's judgment regarding the nature and severity of Plaintiff's impairments, along with Plaintiff's symptoms, diagnosis and prognosis. Yet, the ALJ dismissed the treating physician's opinion in one sentence for the single reason that the ALJ found the treating physician to be "obviously a friend of the claimant" thereby calling his objectivity into question [R. 15]. Nowhere does the ALJ give specific, legitimate reasons for disregarding the treating physician's opinion that Plaintiff is disabled. Nor did he consider the specific factors set forth in 20 CFR §404.1527(d)(2-6) and *Gotcher v. United States Department of Health and Human Services*, 52 F.3d 288 (10th Cir. 1995) to determine what weight to be given to the medical opinion of the treating physician.

The Court therefore finds that the decision of the Secretary is not supported by substantial evidence. The Court further finds that the Secretary erred in failing to give controlling weight to the opinion of the treating physician. The Court therefore REVERSES the decision of the Secretary and REMANDS this case to the Secretary for the award of benefits to Plaintiff. 42 U.S.C. §405(g), *Dollar v. Bowen*, 821 F.2d 530 (10th Cir. 1987).

SO ORDERED THIS 16th day of OCT., 1995.


FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

HERBERT ROBERTS)
SS# 444-38-0255,)
Plaintiff,)
v.)
SHIRLEY S. CHATER, Commissioner,)
Social Security Administration,)
Defendant.)

NO. 93-C-1136-M

ENTERED ON DOCKET
OCT 17 1995
DATE _____

FILED

OCT 19 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JUDGMENT

Judgment is hereby entered for the Plaintiff and against Defendant. Dated this 16th day
of OCT., 1995.

Frank H. McCarthy
FRANK H. McCARTHY
UNITED STATES MAGISTRATE JUDGE

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FILED

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

OCT 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

PATRICK OSEI,)
)
Plaintiff,)
)
vs.)
)
KIMBERLY-CLARK CORPORATION,)
)
Defendant.)

Case No. 95-C-910-BU

ENTERED ON DOCKET
DATE OCT 17 1995

ORDER

This is an action originally commenced in the District Court of Tulsa County, Oklahoma, and subsequently removed to this Court by Defendant pursuant to 28 U.S.C. § 1441(b), wherein Plaintiff seeks to recover damages for wrongful discharge. In its notice of removal, Defendant has asserted that the Court has jurisdiction over this action by reason of diversity of citizenship and amount in controversy pursuant to 28 U.S.C. § 1332(a).

Plaintiff has now filed a motion seeking to remand this action to Tulsa County pursuant 28 U.S.C. § 1447(c). Plaintiff contends that the amount in controversy in this action is less than \$50,000 as Plaintiff's Petition prays for a judgment against Defendant for actual and punitive damages "in excess of \$10,000, but not yet in excess of \$50,000." Defendant has not responded to the motion within the time prescribed by Local Rule 7.1(C). Pursuant to Local Rule 7.1(C), the Court deems the motion confessed.

Upon review, the Court finds that remand is proper. Ordinarily, the amount in controversy is to be determined by the allegations in the complaint, or, where they are not dispositive, the allegations in the petition for removal. Laughlin v. Kmart

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Corporation, 50 F.3d 871, 873 (10th Cir.), cert. denied, 1995 WL 428170 (U.S. Oct. 2, 1995). The sum claimed by a plaintiff in the complaint controls if the claim is apparently made in good faith. St. Paul Indemnity Co. v. Red Cab Co., 303 U.S. 283, 288 (1938). An action in which the complaint seeks less than the federal jurisdictional amount is not removable even if the pleadings clearly allege a greater injury. 14A Wright, Miller & Cooper, Federal Practice and Procedure §§ 3702 and 3725 (1985).

In the instant case, Plaintiff in his Petition has prayed for actual and punitive damages "in excess of \$10,000, but not yet in excess of \$50,000." Because the sum of damages claimed by Plaintiff controls and Defendant has failed to prove that such claim which does not exceed \$50,000 is not made in good faith and because Defendant has failed to set forth in its notice of removal underlying facts which support the assertion that the amount in controversy exceeds \$50,000, see, St. Paul Indemnity Co., 303 U.S. at 288-289 and Laughlin, 50 F.3d at 873, the Court finds that this case does not satisfy the \$50,000 jurisdictional amount requirement of 28 U.S.C. § 1332.

Accordingly, the Court GRANTS Plaintiffs' Motion to Remand (Docket Entry #6) and STRIKES the case management conference currently scheduled for December 18, 1995 at 2:20 p.m. The Clerk of the Court is directed to mail a certified copy of this order to the Clerk of the District Court of Tulsa County, Oklahoma.

ENTERED this 16th day of October 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

PUBLIC SERVICE COMPANY OF)
OKLAHOMA, an Oklahoma)
corporation,)
)
Plaintiff,)
)
TRANSOK, INC.,)
)
Plaintiff-Intervenor,)
)
vs.)
)
WAGNER & BROWN II, a)
partnership, GERALD)
ADKINS, and FALSE RIVER)
LIMITED,)
)
Defendants,)
)
STATE OF OKLAHOMA ex rel.)
Corporation Commission of)
the State of Oklahoma,)
)
Defendant-Intervenor.)

FILE

OCT 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 92-C-477-BU

ENTERED ON DOCKET
DATE OCT 17 1995

ORDER

On September 13, 1994, the Court administratively closed this case during the pendency of the proceedings before the Oklahoma Corporation Commission. The Court directed the parties to advise the Court within ten (10) days of the final resolution of the proceedings before the Oklahoma Corporation Commission so that the Court may reopen this matter, if necessary, to obtain a final determination of the litigation.

This matter now comes before the Court upon the Joint Request to Reopen Case and Dismiss filed by the remaining parties to this litigation, Public Service Company of Oklahoma, Transok, Inc. and the Oklahoma Corporation Commission. The parties request the Court

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to lift the administrative closing order entered on September 1, 1994 and dismiss this matter without prejudice. In support of their request, the parties state that the administrative proceeding before the Oklahoma Corporation Commission has been completed and the dispute between the remaining parties have become moot. Upon due consideration of the parties' request, the Court finds that the parties' request should be granted.

Accordingly, the Joint Request to Reopen Case and Dismiss filed on October 10, 1995 is hereby GRANTED. The administrative closing order entered on September 14, 1994 is hereby LIFTED and this matter is hereby DISMISSED WITHOUT PREJUDICE.

ENTERED this 16th day of October, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 16 1995

PHILLIP JAMES WRIGHT and
BETTY WRIGHT,

Plaintiff,

vs.

INTERPLASTIC CORPORATION,

Defendant.

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

Case No. 95-C-347-BU

ENTERED ON DOCKET

DATE OCT 17 1995

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiffs' action shall be deemed to be dismissed with prejudice.

Entered this 16th day of October, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED
OCT 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JEFFREY M. WEISER, PAUL E.)
JORNAYVAZ AND HOWARD MARTIN,)

Plaintiffs,)

vs.)

Case No. 95-C-854-BU

STEPHEN J. HEYMAN, STEPHEN)
E. JACKSON, individually)
and as Trustee of the)
Stephen E. Jackson Trust,)

Defendants.)

ENTERED ON DOCKET
DATE OCT 17 1995

ORDER

This matter comes before the Court upon the parties' Joint Motion for Administrative Closing Order filed on October 13, 1995. Upon due consideration and for good cause shown, the Court finds that the motion should be and is hereby GRANTED.

IT IS THEREFORE ORDERED that the Clerk of the Court administratively terminate this action in his records during the pendency of the appeal in the Oklahoma Supreme Court styled Robert W. Jackson, individually and as Trustee of the Robert W. Jackson Trust v. Stephen J. Heyman and Stephen E. Jackson, individually and as Trustee of the Stephen E. Jackson Trust, Appeal No. 86132.

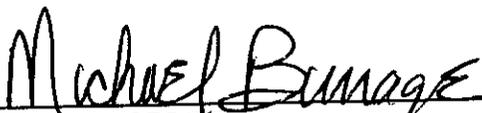
IT IS FURTHER ORDERED that the parties shall notify the Court in writing of the issuance of the mandate in the above-cited appeal within thirty (30) days thereafter so that the Court may reopen these proceedings for final resolution.

IT IS FURTHER ORDERED that the defendants' answer or motion responsive to the First Amended Complaint shall be due within

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twenty (20) days after these proceedings have been reopened by the Court.

Entered this 16th day of October, 1995.


MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JACK SMITH,
Petitioner,
vs.
MARY PUNCHES,
Respondent.

No. 94-C-1055-BU

ENTERED ON DOCKET
OCT 17 1995
DATE _____

ORDER

In the instant petition for a writ of habeas corpus, Petitioner alleges that he is entitled to certain earned credits which he accrued while employed at Western State Hospital, a facility on the same grounds as the William S. Key Correctional Center, where Petitioner was incarcerated until his release from custody on May 11, 1995.

Because Petitioner is no longer in custody, his request for earned credits is now moot. Accordingly, this petition for a writ of habeas corpus is hereby dismissed with prejudice.

SO ORDERED THIS 16 day of October, 1995.

Michael Burrage
MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

JOHN GRANT,)
)
Petitioner,)
)
vs.)
)
MIKE ADDISON,)
)
Respondent.)

No. 94-C-864-BU

ENTERED ON DOCKET
OCT 17 1995
DATE _____

ORDER

On July 20, 1995, the Court raised sua sponte the defense of abuse of the writ as to grounds one and two of the petition and granted Petitioner, a pro se litigant, fifteen days to show whether "the ends of justice would be served by a redetermination of the[se] ground[s]." Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir. 1992) (quoted case omitted). Each side has briefed the relevant issues.

I. BACKGROUND

On May 21, 1981, Petitioner pled guilty on the basis of a plea agreement to Robbery with Firearms and Larceny of Automobile, After Former Conviction of a Felony, in Case Nos. CF-79-396 and CF-81-341, Ottawa County District Court. It was Petitioner's understanding (1) that his sentence in these two cases would run concurrent to his sentence in Case No. CRF-80-1156, which he was then serving and (2) that the sentence would commence to run on April 2, 1981. However, on August 13, 1981, the district court entered an amended judgment and sentence which altered the original

plea agreement to reflect that the sentence in Case Nos. CF-79-396 and CF-81-341 would run consecutive to Petitioner's sentence in Case No. CRF-80-1156.

After seeking post-conviction relief in state court, Petitioner filed a petition for a writ of habeas corpus in this District. On November 29, 1990, the Magistrate Judge found that the state court broke the plea agreement when it amended Petitioner's Judgment and Sentence. The Magistrate Judge then recommended that a conditional writ be issued "remanding Petitioner's case to the courts of the State of Oklahoma to allow Petitioner to withdraw his plea, enter a new plea and be tried and/or sentenced." (Grant v. Kaiser, Case No. 90-C-192-C, docket #17.) On March 18, 1991, the Honorable H. Dale Cook adopted the Magistrate Judge's Report and remanded the case to the District Court of Ottawa County with directions to vacate the Amended Judgment and Sentence and to sentence Petitioner in accordance with the plea agreement or, in the alternative, to permit him to withdraw his plea of guilty. (Id., docket #22.)

Thereafter, Petitioner moved to modify the March 18 Order. He contended that he should be allowed to withdraw his plea of guilty because he had been prejudiced as a result of the abuse of authority on the part of the District Attorney's Office. He contended that he had been denied the opportunity to qualify for parole review and prison jobs as a result of the broken plea agreement. He also contended that to "allow the District Court of Ottawa County, to now sentence me in accordance with the original

plea agreement, seems to me that it will only compound the prejudice and suffering I have already endured from the broken-plea-agreement." (Id., docket #23 at 2.) The federal district court denied relief on June 26, 1991. (Id., minute order issued on June 26, 1991.)

In the meanwhile, Petitioner filed a motion to withdraw his plea of guilty in Ottawa County District Court. The state court denied Petitioner's request as it was prepared to resentence him in accordance with the original plea agreement. (June 6, 1991 hearing, attached as ex. C to Respondent's response to December 21, 1994 order.) The state court, however, failed to order the sentences in Case Nos. CRF-79-396 and CRF-81-341 to run concurrently with the remainder of Petitioner's sentence in Case No. CRF-80-1156, and on June 9, 1992, the Honorable James O. Ellison (to whom the case had been administratively transferred) again remanded the case to Ottawa County District Court to comply with the Court's previous order. (Grant, 90-C-192-E, docket #33.) On June 25, 1992, the state court entered an amended judgment specifically providing that the sentences in Case Nos. CRF-79-396 and CRF-81-341 were to run concurrently with the remainder of Petitioner's sentence in Case No. CRF-80-1156. (Id., docket #42.)

Petitioner timely appealed to the Tenth Circuit Court of Appeals, requesting not to be bound by the plea agreement because of the prejudice he had suffered as a result of the unkept agreement. On June 28, 1993, the Tenth Circuit Court of Appeals affirmed the district court's order and held that Petitioner had no

right to choose whether he should be resentenced in accordance with the terms of the plea agreement or whether he should be permitted to withdraw his plea because that decision was within the discretion of the state court. The Tenth Circuit also concluded that Petitioner had failed to show ineffective assistance of counsel. (Id., docket #44.)

Petitioner then sought post-conviction relief in Ottawa County District Court, alleging that he was entitled to withdraw his plea of guilty because at the time of the last re-sentencing he had discharged his sentence in Case No. CF-80-1156, and he had been ineligible to receive earned good-time credits during the four and one-half years when the sentence ran concurrent with Case No. CF-80-1156. Petitioner further alleged that because of the broken plea agreement he has had to serve twelve and one-half years to be considered for parole in violation of his Due Process rights. On January 31, 1994, the Ottawa County District Court denied relief concluding that Petitioner was properly resentenced on June 6, 1992, in accordance with the order of the United States District Court and that he was not entitled to further relief. The Court of Criminal Appeals affirmed on July 12, 1994.

In the present petition for a writ of habeas corpus, Petitioner again challenges his guilty plea in Case Nos. CRF-79-396 and CRF-81-341. He alleges his plea was involuntary because the plea agreement was not as he understood it. In his first ground, he contends that he

would have never plead[ed] guilty if the plea agreement would not be as he understood [it]. Because of the

broken agreement, the Petitioner has been made to serve several more years to become eligible for programs such as D.O.T. jobs, Public Service jobs, earning 3 days off his sentence for each day worked.

(Petition, docket #1, at 6) In his second ground, Petitioner contends that "he had a mandatory procedural right to be given [an] opportunity to withdraw his guilty plea if the trial Judge decided not to honor his plea agreements." (Id. at 8.) In his last ground, Petitioner contends that his constitutional rights have been violated because he has been denied the right to be considered for parole in 8 and 1/3 years and that the Department of Corrections has refused to give him good-time credits upon discharging his pre-existing sentence in CRF-80-1156. (Id. at 10.)

II. ANALYSIS

A. Grounds I and II

The law regarding dismissal of successive section 2254 petitions is clear. Rule 9(b) states as follows:

Successive petitions. A second or successive petition may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the petitioner to assert those grounds in a prior petition constituted an abuse of the writ.

In this case it is undisputed that Petitioner previously filed one habeas corpus action, 90-C-192-E, and received some habeas relief. Therefore, Petitioner bears the burden of showing that "the ends of justice would be served by a redetermination of the ground[s]," Parks v. Reynolds, 958 F.2d 989, 994 (10th Cir. 1992) (quoting Sanders v. United States, 373 U.S. 1 (1963)), cert.

denied, 503 U.S. 928 (1992), and the entry of an order granting further relief. In McClesky v. Zant, 499 U.S. 467, 495 (1991), the Supreme Court equated the "ends of justice" inquiry with the "fundamental miscarriage of justice" inquiry. See also Parks, 958 F.2d at 994.

The Supreme Court recently summarized its prior holdings involving a defendant's subsequent use of the habeas writ. In Herrera v. Collins, 113 S.Ct. 853, 862 (1993), the Court stated

that a petitioner otherwise subject to defenses of abusive or successive use of the writ may have his federal constitutional claim considered on the merits if he makes a proper showing of actual innocence. This rule, or fundamental miscarriage of justice exception, is grounded in the 'equitable discretion' of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons.

See also McClesky v. Zant, 499 U.S. at 495; Kuhlmann v. Wilson, 477 U.S. 436, 454 (1986) (plurality opinion); Parks, 958 F.2d at 995.

Petitioner has made no colorable showing of actual innocence as to his 1981 guilty plea convictions which would justify reaching the merits of the successive claims. Therefore, the Court finds that Petitioner's first and second claims should be dismissed as successive under Rule 9(b).

Even if the Court were to treat Petitioner's first two grounds for relief as new claims under Rule 9(b), they would still be subject to dismissal as abusive. Petitioner has not shown adequate cause or prejudice under the strict McCleskey standard for failing

to raise those claims in his first habeas petition.¹ McCleskey, 499 U.S. 467. Nor has he met the narrow miscarriage of justice exception to the cause requirement, as he has not demonstrated that the alleged constitutional violation caused the conviction of an innocent man. Id. at 495.

Accordingly, Petitioner's first and second claims are hereby dismissed under Rule 9(b) of the Rules Governing Section 2254 cases.

B. Ground III

In Ground III of his petition, Petitioner contends that his constitutional rights have been violated because he has been denied the right to be considered for parole in 8 and 1/3 years because of the broken plea agreement. He further argues that the Department of Corrections has refused to give the Petitioner his good-time credits upon discharging his pre-existing sentence in Case No. CRF-80-1156.

Petitioner acknowledges that he does not have a Due Process right to be considered for parole. He argues, however, that "he had a right to be considered for parole in eight and one-third years, under 57 O.S.A. § 332.7B, and because of the broken plea

¹ Petitioner reliance on Fifth Circuit precedent for the proposition that the "cause and prejudice" standard does not apply to pro se prisoners as it applies to prisoners represented by counsel is unpersuasive. On March 25, 1992, the Fifth Circuit Court of Appeals recognized that McCleskey's cause-and-prejudice standard applies to pro se litigants just as it does to those who are assisted by counsel. Saahir v. Collins, 956 F.2d 115, 119 (5th Cir. 1992); see also United States v. Flores, 981 F.2d 231, 236 n.8 (5th Cir. 1993).

agreement, the Petitioner was made [sic] to serve several more years" before being considered for parole. In Shirley v. Chestnut, 603 F.2d 805, 806-807 (10th Cir. 1979), the Tenth Circuit Court of appeals held that section 332 does not create a liberty interest thus entitling state prisoners to Due Process protection. Because Petitioner's claim is based only on the alleged violation of state law, he is not entitled to habeas relief. It is well established that "a federal court may not issue the writ on the basis of a perceived error of state law." Pulley v. Harris, 465 U.S. 37, 41 (1984).

Because Petitioner does not dispute that the Department of Corrections has since awarded him 2,317 days of lost good-time credits, the Court finds his last claim abandoned and dismisses it as moot.

III. CONCLUSION

Accordingly, the petition for a writ of habeas corpus (docket #1) and Petitioner's motion to strike (docket #22) are hereby denied.

SO ORDERED THIS 16th day of October, 1995.


MICHEAL BURRAGE
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
SAUNDRA J. HAYES; TULSA)
DEVELOPMENT AUTHORITY;)
COUNTY TREASURER, Tulsa County,)
Oklahoma; BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.)

ENTERED ON DOCKET

DATE OCT 17 1995

Civil Case No. 95-C 577C

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 16 day of Oct, 1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, SAUNDRA J. HAYES, and TULSA DEVELOPMENT AUTHORITY, appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendant, SAUNDRA J. HAYES, was served a copy of Summons and Complaint on August 30, 1995, by Certified Mail; that the Defendant, TULSA DEVELOPMENT AUTHORITY, signed a Waiver of Summons on July 5, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answers on July 11, 1995; and that the Defendants, SAUNDRA J. HAYES and

NOTE: THIS ORDER IS TO BE MAILED BY THE CLERK OF COURT TO COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

TULSA DEVELOPMENT AUTHORITY, have failed to answer and her default has therefore been entered by the Clerk of this Court.

The Court further finds that the Defendant, SAUNDRA H. HAYES, is a single unmarried person.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Forty-three (43), Block Two (2), of the AMENDED PLAT OF SUBURBAN ACRES ADDITION to the City of Tulsa, County of Tulsa, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on December 15, 1983, the Defendant, SAUNDRA J. HAYES, executed and delivered to THE UNITED STATES OF AMERICA ACTING BY AND THROUGH THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, her mortgage note in the amount of \$38,000.00, payable in monthly installments, with interest thereon at the rate of Eight percent (8%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendant, SAUNDRA J. HAYES, a single woman, executed and delivered to THE UNITED STATES OF AMERICA ACTING BY AND THROUGH THE SECRETARY OF HOUSING AND URBAN DEVELOPMENT, a mortgage dated December 15, 1983, covering the above-described property. Said mortgage was recorded on December 22, 1983, in Book 4754, Page 642, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 15, 1989, the Defendant, SAUNDRA J. HAYES, entered into an agreement with the Plaintiff lowering the amount of the monthly

installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose. Superseding agreements were reached between these same parties on May 31, 1990, January 14, 1991, and September 11, 1991.

The Court further finds that the Defendant, SAUNDRA J. HAYES, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of her failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, SAUNDRA J. HAYES, is indebted to the Plaintiff in the principal sum of \$49,806.79, plus interest at the rate of 8 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$14.00 which became a lien on the property as of June 26, 1992, a lien in the amount of \$7.00 which became a lien on the property as of June 25, 1993, a lien in the amount of \$7.00 which became a lien on the property as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, SAUNDRA J. HAYES and TULSA DEVELOPMENT AUTHORITY, are in default, and has no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment against the Defendant, SAUNDRA J. HAYES, in the principal sum of \$49,806.79, plus interest at the rate of 8 percent per annum from May 1, 1995 until judgment, plus interest thereafter at the current legal rate of 5.62 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$28.00, plus accruing costs and interest, for personal property taxes for the years 1991, 1992, and 1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, SAUNDRA J. HAYES and TULSA DEVELOPMENT AUTHORITY, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, SAUNDRA J. HAYES, to satisfy the judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election

with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$28.00, plus accruing costs and interest, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

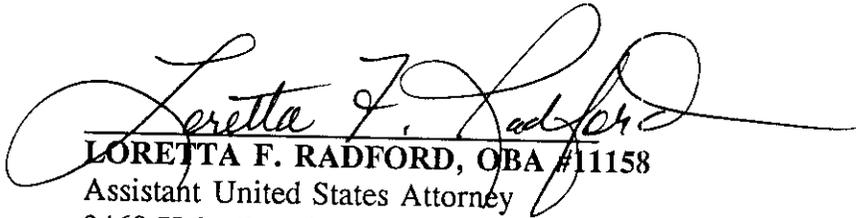
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the

Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

(Signed) H. Dale Cook
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney



LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463



DICK A. BLAKELEY, OBA #852
Assistant District Attorney
406 Tulsa County Courthouse
Tulsa, Oklahoma 74103
(918) 596-4842
Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95 C 577C

LFR:flv

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

TONY LAMAR VANN,)
)
 Plaintiff,)
)
 vs.)
)
 WILLIAM H. MATTINGLY, et al.,)
)
 Defendants.)

No. 95-C-906-C

ENTERED ON DOCKET
DATE OCT 17 1995

FILED

OCT 16 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

ORDER

On September 21, 1995, the Court granted Plaintiff, a state inmate, leave to file this civil rights action in forma pauperis. The Court now reviews Plaintiff's allegations and concludes that this action should be dismissed as frivolous.

In his pro se complaint, Plaintiff sues Osage County District Judges William H. Mattingly and David Gambill, Assistant District Attorney Rene P. Henry, Attorneys Allen C. Cowdery and Curley Higgins, the State of Oklahoma, and Ron Williams, as head of the Tulsa Housing Assistance Corporation, for malicious prosecution and false and wrongful incarceration. He alleges that Williams forced Plaintiff to vacate the premises at 814 and 816 North Osage Drive, Tulsa, Oklahoma, in thirty days without compensating him for moving his two businesses and then conspired with the District Attorney's Office and the District Judges to incarcerate Plaintiff on bogus charges. He seeks actual and punitive damages for the false imprisonment. (Doc. #1.)

The federal in forma pauperis statute is designed to ensure that indigent litigants have meaningful access to the federal courts without prepayment of fees or costs. Neitzke v. Williams,

490 U.S. 319, 324 (1989); 28 U.S.C. § 1915(d). To prevent abusive litigation, however, section 1915(d) allows a federal court to dismiss an in forma pauperis suit if the suit is frivolous. See 28 U.S.C. § 1915(d). A suit is frivolous if "it lacks an arguable basis in either law or fact." Neitzke, 490 U.S. at 325; Olson v. Hart, 965 F.2d 940, 942 n.3 (10th Cir. 1992). A suit is legally frivolous if it is based on "an indisputably meritless legal theory." Denton v. Hernandez, 112 S. Ct. 1728, 1733 (1992) (quoting Neitzke, 490 U.S. at 327). A complaint is factually frivolous, on the other hand, if "the factual contentions are clearly baseless." Id.

After liberally construing Plaintiff's pro se pleadings, see Haines v. Kerner, 404 U.S. 519, 520-21 (1972); Hall v. Bellmon, 935 F.2d 1106, 1100 (10th Cir. 1991), the Court concludes that this action lacks an arguable basis in law and should be dismissed sua sponte as frivolous. The State of Oklahoma is not a "person" for purposes of section 1983, Will v. Michigan Dep't of State Police, 491 U.S. 58, 64 (1989), and Assistant District Attorney Henry is entitled to absolute immunity for his actions taken in his role as prosecutor. Imbler v. Pachtman, 424 U.S. 409, 427-28 (1976). Judges Mattingly and Gambil are also absolutely immune from this suit because they acted in their judicial capacity during the plea and sentencing hearings. See Stump v. Sparkman, 435 U.S. 349, 356 (1978); Schepp v. Fremont County, 900 F.2d 1448, 1451 (10th Cir. 1990). "A judge acting in his judicial capacity is absolutely immune from civil rights suits unless the judge acts clearly

without any colorable claim of jurisdiction." Snell v. Turner, 920 F.2d 673, 686 (10th Cir. 1990), cert. denied, 111 S.Ct. 1622 (1991). Immunity does not dissolve when the judge is accused of acting maliciously or corruptly. Pierson v. Ray, 386 U.S. 547, 554 (1967); Christensen v. Ward, 916 F.2d 1462, 1473 (10th Cir.), cert. denied, 111 S. Ct. 559 (1990). There is no argument that the judges involved here acted without jurisdiction, and therefore the Court concludes that they are absolutely immune from this action.

While Plaintiff may be able to state a malpractice claim under Oklahoma law against Cowdery and Higgins that claim does not constitute a federal case.¹ See Lemmons v. Law Firm of Morris and Morris, 39 F.3d 264, 266 (10th Cir. 1994); see also Bilal v. Kaplan, 904 F.2d 14, 15 (8th Cir. 1990) (per curiam); Brown v. Schiff, 614 F.2d 237, 239 (10th Cir.) (per curiam), cert. denied, 446 U.S. 941 (1980). "The conduct of counsel, either retained or appointed, in representing clients, does not constitute action under color of state law for purposes of a section 1983 violation." Bilal, 904 F.2d at 15; see also Lemmons, 39 F.3d at 266. Cf., Tower v. Glover, 467 U.S. 914, 920 (1984) (citing Polk County v. Dodson, 454 U.S. 312, 325 (1981)) (public defender does not act under color of state law when representing an indigent defendant in a state criminal proceeding). Moreover, Plaintiff has not alleged any grounds for the exercise of diversity jurisdiction in this case. See Lemmons, 39 F.3d at 266.

¹This comment should not be construed as this court is in any way indicating such claim has merit.

Lastly, Plaintiff cannot seek money damages for the alleged invalidity of his conviction in Osage County prior to a determination that the conviction and resulting confinement are invalid. The Supreme Court recently held in Heck v Humphrey, 114 S.Ct. 2364, 2372 (1994), that in order to recover damages in an action brought pursuant to 42 U.S.C. § 1983 for an allegedly unconstitutional conviction or imprisonment, or for "other harm caused by actions whose unlawfulness would render a conviction or sentence invalid," a prisoner must show that the conviction or sentence has been "reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus."

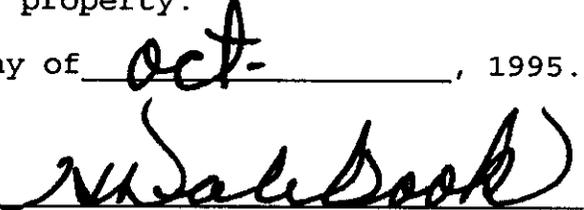
Because the validity of Plaintiff's conviction and sentence has yet to be undermined, the Court must evaluate Plaintiff's claims to determine whether they challenge the constitutionality of his conviction or sentence. The Court concludes that they do. The majority of Plaintiff's allegations amount to claims of ineffective assistance of counsel. If proved, these claims would call Plaintiff's conviction into question under cases such as Strickland v. Washington, 466 U.S. 668 (1984). Liberally construed, Plaintiff's complaint also alleges that the Osage County District Attorney's Office and the Osage County District Judges violated the plea agreement and improperly enhanced Plaintiff's sentence.

Although pro se pleadings are to be construed liberally, see Haines, 404 U.S. at 520-21, a review of the complaint reveals

neither factual allegations nor legal theories that might arguably support a basis for relief. Neitzke, 490 U.S. at 325. As noted above a decision in Plaintiff's favor would necessarily imply that his conviction and resulting confinement are invalid. Therefore, Plaintiff's complaint must be dismissed at this time without prejudice.

ACCORDINGLY, IT IS HEREBY ORDERED that this action is hereby dismissed without prejudice pursuant to 28 U.S.C. § 1915(d). The Clerk shall mail to Plaintiff (1) a copy of the complaint, and (2) a copy of the writ of attachment of property.

IT IS SO ORDERED this 16 day of oct., 1995.


H. DALE COOK
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

JOHN LEONARD SCOTT,

Plaintiff,

vs.

SUNCAST CORPORATION and
WAL-MART STORES, INC. d/b/a
SAM'S WHOLESALE CLUB,

Defendants.

COPY

Case No. 95-C-0062-K

ENTERED ON DOCKET
DATE OCT 17 1995

FILED

OCT 16 1995

STIPULATION OF DISMISSAL

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

COMES NOW Plaintiff and Defendants and stipulate that the
above-entitled and numbered cause is dismissed with prejudice to
Plaintiff's right to refile same.

Respectfully submitted,

RHODES, HIERONYMUS, JONES, TUCKER
& GABLE

By:



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P.O. Box 21100
Tulsa, Oklahoma 74121-1100
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Attorney for Defendants

ELIAS, HJELM & TAYLOR, P.C.

By:



DAVID K. ROBERTSON
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717 South Houston, Suite 300
Tulsa, OK 74127-9006
(918) 599-9090
Attorney for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 13 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

MICHAEL BARBER

Plaintiff,

v.

ANSA COMPANY and
AUSTIN IODICE

Defendants.

Case No. 95-CV-377-H

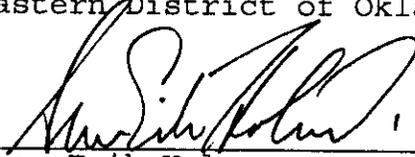
ENTERED ON DOCKET

DATE OCT 16 1995

O R D E R

This matter comes before the Court on Defendant Ansa Company's Motion to Dismiss. Ansa claims that venue is improper in this Court because the events giving rise to this action occurred in Muskogee, Oklahoma, which is located in the Eastern District of Oklahoma. Plaintiff Michael Barber does not object to a transfer of venue to that district. The Court therefore finds that venue in this Court is improper and transfers this matter to the United States District Court for the Eastern District of Oklahoma.

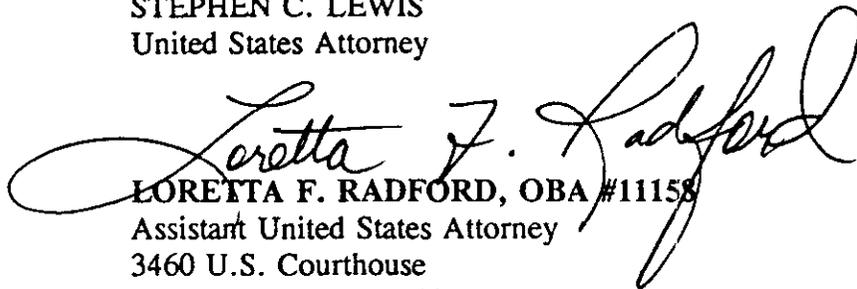
IT IS SO ORDERED.



Sven Erik Holmes
United States District Judge

APPROVED AS TO FORM AND CONTENT:

STEPHEN C. LEWIS
United States Attorney

A large, elegant handwritten signature in black ink, reading "Loretta F. Radford". The signature is written in a cursive style with a large initial "L" and a long, sweeping underline.

LORETTA F. RADFORD, OBA #11158
Assistant United States Attorney
3460 U.S. Courthouse
Tulsa, Oklahoma 74103
(918) 581-7463

LFR:flv

FILED

OCT 13 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

DELBERT HARRY DEAN, III,)
)
 Plaintiff,)
)
 v.)
)
 PAPER CONVERTING MACHINE COMPANY,)
)
 Defendant.)

Case No. 94-C-559-H

ENTERED ON DOCKET

DATE OCT 16 1995

J U D G M E N T

This action came on for consideration before the Court, The Honorable Sven Erik Holmes, District Judge, presiding, and the issues having been duly heard, and a decision having been duly rendered in favor of the Defendant,

IT IS THEREFORE ORDERED that the Plaintiff take nothing from the Defendant and that the action be dismissed on the merits.

IT IS SO ORDERED.

This 11TH day of October, 1995.



Sven Erik Holmes
United States District Judge

(82)

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 13 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

CLAIR MAXINE RODMAN,)
)
Plaintiff,)
)
v.)
)
DONNA E. SHALALA,)
)
Secretary of HHS,)
)
Defendant.)

Case No. 93-C-1045-H ✓

ENTERED ON DOCKET

DATE OCT 16 1995

J U D G M E N T

This matter came before the Court on a Report and Recommendation by the United States Magistrate Judge. The Court duly considered the issues and rendered a decision in accordance with the order of July 14, 1995.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the Plaintiff and against the Defendant.

IT IS SO ORDERED.

This 11TH day of October 1995.



Sven Erik Holmes
United States District Judge

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 13 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 vs.)
)
 J.W. RAPER; JOYCE NELL RAPER;)
 AIC FINANCIAL SERVICES, INC.;)
 CONTINENTAL FEDERAL SAVINGS &)
 LOAN ASSOCIATION F.A. by and)
 through its conservator, Resolution Trust)
 corporation as successor in interest to)
 certain assets of Continental Federal)
 Savings & Loan Association; CITY OF)
 TULSA, Oklahoma; COUNTY)
 TREASURER, Tulsa County, Oklahoma;)
 BOARD OF COUNTY)
 COMMISSIONERS, Tulsa County,)
 Oklahoma,)
)
 Defendants.)

ENTERED ON DOCKET

DATE OCT 16 1995

Civil Case No. 95-C 460H

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of Oct,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendant, CITY OF TULSA, Oklahoma, appears by City Attorney Alan Jackare; the Defendant, CONTINENTAL FEDERAL SAVINGS & LOAN ASSOCIATION F.A. by and through its conservator Resolution Trust Corporation as successor in interest to certain assets of Continental Federal Savings and Loan Association, appears not having previously filed in its Disclaimer; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear not, having previously claimed no interest in the subject property; and the Defendants, J.W. RAPER,

JOYCE NELL RAPER, and AIC FINANCIAL SERVICES, INC., appear not, but make default.

The Court being fully advised and having examined the court file finds that the Defendants, J.W. RAPER and JOYCE NELL RAPER, are each single, unmarried persons.

The Court being fully advised and having examined the court file finds that the Defendant, J.W. RAPER, acknowledged receipt of Summons via certified mail on July 31, 1995; that the Defendant, JOYCE NELL RAPER, waived service of Summons on June 2, 1995; and that the Defendant, CITY OF TULSA, Oklahoma, acknowledged receipt of Summons and Complaint via certified mail on May 22, 1995.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on July 6, 1995; that the Defendant, CONTINENTAL FEDERAL SAVINGS & LOAN ASSOCIATION F. A. by and through its conservator Resolution Trust Corporation as successor in interest to certain assets of Continental Federal Savings and Loan Association, filed its Disclaimer on August 21, 1995; that the Defendant, CITY OF TULSA, Oklahoma, filed its Answer to the Amended Complaint on August 15 1995; and that the Defendants, J.W. RAPER, JOYCE NELL RAPER, and AIC FINANCIAL SERVICES, INC., have failed to answer and their default has therefore been entered by the Clerk of this Court.

FIRST CAUSE OF ACTION

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described

real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Thirteen (13), Block Two (2), EL'BRAD, an Addition in Tulsa County, State of Oklahoma, according to the Recorded Plat thereof.

The Court further finds that on July 25, 1985, the Defendants, J.W. RAPER and JOYCE NELL RAPER, and C.M. Davis and Patricia A. Davis, executed and delivered to FIRST SECURITY MORTGAGE COMPANY their mortgage note in the amount of \$34,850.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, J.W.RAPER and JOYCE NELL RAPER, then Husband and Wife, and C.M. Davis and Patricia A. Davis, Husband and Wife, executed and delivered to First Security Mortgage Company a mortgage dated July 25, 1985, covering the above-described property. Said mortgage was recorded on August 9, 1985, in Book 4883, Page 1363, in the records of Tulsa County, Oklahoma.

The Court further finds that on July 25, 1985, FIRST SECURITY MORTGAGE COMPANY assigned the above-described mortgage note and mortgage to ASSOCIATES NATIONAL MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on August 26, 1985, in Book 4887, Page 456, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 21, 1988, ASSOCIATES NATIONAL MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C.,

HIS/HER SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on April 14, 1988, in Book 5093, Page 1125, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, J.W. RAPER and JOYCE NELL RAPER, became the current records owners of the property by virtue of a General Warranty Deed dated March 3, 1987, and recorded on February 29, 1988 in Book 5083, Page 1743, in the records of Tulsa County, Oklahoma. The Defendants, J.W. RAPER and JOYCE NELL RAPER, became the current assumptors of the subject indebtedness.

The Court further finds that on March 10, 1988, the Defendant, J.W. RAPER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that on November 14, 1990, the Defendant, J.W. RAPER, filed his petition for Chapter 7 relief, case number 90-3512, in the United States Bankruptcy Court for the Northern District of Oklahoma. This case was discharged on March 19, 1991, and subsequently closed on December 5, 1991.

The Court further finds that on November 28, 1990, the Defendant, JOYCE NELL RAPER, filed her petition for Chapter 7 relief, case number 90-3692, in the United States Bankruptcy Court for the Northern District of Oklahoma. This case was discharged on March 21, 1991 and subsequently closed on November 24, 1993.

The Court further finds that the Defendant, J.W. RAPER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of his failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendant, J.W.

RAPER, is indebted to the Plaintiff in the principal sum of \$68,032.57, plus interest at the rate of 12 percent per annum from March 10, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, J.W. RAPER, JOYCE NELL RAPER, and AIC FINANCIAL SERVICES, INC., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, CONTINENTAL FEDERAL SAVINGS & LOAN ASSOCIATION F.A. by and through its conservator, Resolution Trust Corporation as successor in interest to certain assets of Continental Federal Savings and Loan Association, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, CITY OF TULSA, Oklahoma, disclaims any right, title, or interest in the property which is the subject of the first cause of action.

The Court further finds that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendant, J.W. RAPER, in the principal sum of \$68,032.57, plus interest at the rate of 12 percent per

annum from March 10, 1995 until judgment, plus interest thereafter at the current legal rate of 5.52 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, J.W. RAPER, JOYCE NELL RAPER, CONTINENTAL FEDERAL SAVINGS & LOAN ASSOCIATION F.A. by and through its conservator, Resolution Trust Corporation as successor in interest to certain assets of Continental Federal Savings & Loan Association, CIYT OF TULSA, Oklahoma, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendant, J.W. RAPER, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the
Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

SECOND CAUSE OF ACTION

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

Lot Twelve (12), Block Fifty-eight (58), VALLEY VIEW
ACRES THIRD ADDITION to the City of Tulsa, Tulsa
County, Oklahoma, according to the recorded Plat thereof.

The Court further finds that on July 31, 1985, the Defendants, J.W. RAPER, JOYCE NELL RAPER, and C.M. Davis and Patricia A. Davis, executed and delivered to FIRST SECURITY MORTGAGE COMPANY their mortgage note in the amount of \$31,718.00, payable in monthly installments, with interest thereon at the rate of twelve percent (12%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, J.W. RAPER and JOYCE NELL RAPER, then Husband and Wife, and C.M. Davis and Patricia; A. Davis, Husband and Wife, executed and delivered to First Security Mortgage Company a mortgage dated July 31, 1985, covering the above-described property. Said mortgage was recorded on August 26, 1985, in Book 4887, Page 422, in the records of Tulsa County, Oklahoma.

The Court further finds that on August 1, 1985, First Security Mortgage Company assigned the above-described mortgage note and mortgage to ASSOCIATES NATIONAL MORTGAGE CORPORATION. This Assignment of Mortgage was recorded on September 26, 1985, in Book 4894, Page 1613, in the records of Tulsa County, Oklahoma.

The Court further finds that on March 28, 1988, ASSOCIATES NATIONAL MORTGAGE CORPORATION assigned the above-described mortgage note and mortgage to SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., HIS/HER SUCCESSORS AND ASSIGNS. This Assignment of Mortgage was recorded on May 12, 1988, in Book 5099, Page 372, in the records of Tulsa County, Oklahoma.

The Court further finds that the Defendants, J.W. RAPER and JOYCE NELL RAPER, are the current title owners of the property by virtue of a General Warranty Deed dated March 3, 1987, and recorded on February 29, 1988 in Book 5083, Page 1742, in the records of Tulsa County, Oklahoma. The Defendants, J.W. RAPER and JOYCE NELL RAPER, are the current assumptors of the subject indebtedness.

The Court further finds that on April 1, 1988, the Defendants, J.W. RAPER and JOYCE NELL RAPER, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that on November 14, 1990, the Defendant, J.W. RAPER, filed his petition for Chapter 7 relief, case number 90-3512, in the United States Bankruptcy Court for the Northern District of Oklahoma. This case was discharged on March 19, 1991, and subsequently closed on December 5, 1991.

The Court further finds that on November 28, 1990, the Defendant, JOYCE NELL RAPER, filed her petition for Chapter 7 relief, case number 90-3692, in the United States Bankruptcy Court for the Northern District of Oklahoma. This case was discharged on March 21, 1991 and subsequently closed on November 24, 1993.

The Court further finds that the Defendants, J.W. RAPER and JOYCE NELL RAPER, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, J.W. RAPER and JOYCE NELL RAPER, are indebted to the Plaintiff in the principal sum of \$63,053.97, plus interest at the rate of 12 percent per annum from March 14, 1995 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendants, J.W. RAPER, JOYCE NELL RAPER, and AIC FINANCIAL SERVICES, INC., are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, CONTINENTAL FEDERAL SAVINGS & LOAN ASSOCIATION F.A. by and through its conservator, Resolution Trust Corporation as successor in interest to certain assets of Continental Federal Savings and Loan Association, disclaims any right, title or interest in the subject real property.

The Court further finds that the Defendant, CITY OF TULSA, Oklahoma, has a lien against the subject property for cleanup and hauling, with a balance due of \$80.00.

The Court further finds that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claim no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, J.W. RAPER and JOYCE NELL RAPER, in the principal sum of \$63,053.97, plus interest at the rate of 12 percent per annum from March 14, 1995 until judgment, plus interest thereafter at the current legal rate of 5.52 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, CITY OF TULSA, Oklahoma, have and recover judgment in the amount of \$80.00 for cleanup and hauling, plus the costs and interest.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, J.W. RAPER, JOYCE NELL RAPER, AIC FINANCIAL SERVICES, INC., CONTINENTAL FEDERAL SAVINGS & LOAN ASSOCIATION F.A., by and through its conservator, Resolution Trust Corporation, as successor in interest to certain assets of Continental Federal Savings & Loan Association, COUNTY TREASURER, Tulsa County,

Oklahoma and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, J.W. RAPER and JOYCE NELL RAPER, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisalment the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of Defendant, CITY OF TULSA, Oklahoma, in the amount of \$80.00, plus penalties and interest, for cleanup and hauling, which is presently due and owing on said real property;

Third:

In payment of the judgment rendered herein in favor of the Plaintiff;

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

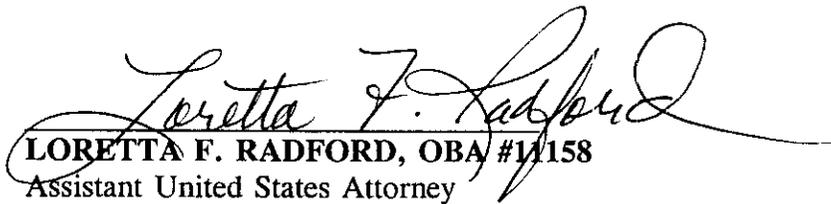
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

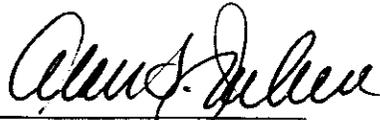
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof.

S/ SVEN ERIK HOLMES
UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


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Attorney for Defendant,
City of Tulsa, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 460H

LFR/lg

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 12 1995 *jk*

FLORINE GALLOWAY,)
)
Plaintiff,)
)
v.)
)
SHIRLEY S. CHATER,)
Commissioner of Social Security,²)
)
Defendant.)

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

Case No: 94-C-916-W ✓

ENTERED ON DOCKET

DATE 10-16-95

JUDGMENT

Judgment is entered in favor of the Plaintiff, Florine Galloway, in accordance with this court's Order filed October 10, 1995.

Dated this 11th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

²Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the Court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 10 1995

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

FLORINE GALLOWAY,

Plaintiff,

v.

SHIRLEY S. CHATER,
COMMISSIONER OF SOCIAL
SECURITY,¹

Defendant.

Case No. 94-C-916-W ✓

ENTERED ON DOCKET

DATE 10-16-95

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The only issue now before the court is whether there is substantial evidence in the record to support the final decision of the Secretary that claimant is not disabled within the meaning of the Social Security Act.²

¹ Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

² Judicial review of the Secretary's determination is limited in scope by 42 U.S.C. § 405(g). The court's sole function is to determine whether the record as a whole contains substantial evidence to support the Secretary's decisions. The Secretary's findings stand if they are supported by "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Richardson v. Perales, 402 U.S. 389, 401 (1971) (citing Consolidated Edison Co. v. N.L.R.B., 305 U.S. 197, 229 (1938)). In deciding whether the Secretary's findings are supported by substantial evidence, the court must consider the record as a whole. Hephner v.

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In the case at bar, the ALJ made his decision at the fifth step of the sequential evaluation process.³ He found that claimant had the residual functional capacity to perform the physical exertional and nonexertional requirements of work, except for lifting and carrying more than 10 pounds frequently, walking and standing more than 6 hours of an 8 hour day, the need to be able to alternate positions, and no reaching overhead. He concluded that she was unable to perform her past relevant work as assembly line work/production lead, and her residual functional capacity for the full range of light work was reduced by the need to be able to alternate positions and no reaching overhead.

The ALJ found that claimant was 50 years old, which is defined as closely approaching advanced age, had a high school and business college education, and had acquired work skills, such as monitoring inventory. He concluded that, although her additional nonexertional limitations did not allow her to perform the full range of light work, there were a significant number of jobs in the national economy which she could perform, including inventory clerk, light, semi-skilled, order clerk, sedentary, unskilled, file clerk, light, unskilled, and cashier, sedentary, unskilled. Having determined that claimant's impairments did not prevent her from performing some light work, the ALJ concluded that

Mathews, 574 F.2d 359 (6th Cir. 1978).

³ The Social Security Regulations require that a five-step sequential evaluation be made in considering a claim for benefits under the Social Security Act:

1. Is the claimant currently working?
2. If claimant is not working, does the claimant have a severe impairment?
3. If the claimant has a severe impairment, does it meet or equal an impairment listed in Appendix 1 of the Social Security Regulations? If so, disability is automatically found.
4. Does the impairment prevent the claimant from doing past relevant work?
5. Does claimant's impairment prevent him from doing any other relevant work available in the national economy?

20 C.F.R. § 404.1520 (1983). See generally, Talbot v. Heckler, 814 F.2d 1456 (10th Cir. 1987); Tillery v. Schweiker, 713 F.2d 601 (10th Cir. 1983).

claimant was not disabled under the Social Security Act at any time through the date of the decision.

Claimant now appeals this ruling and asserts that the decisions of the ALJ are not supported by substantial evidence.

It is well settled that the claimant bears the burden of proving disability that prevents engagement in any gainful work activity. Channel v. Heckler, 747 F.2d 577, 579 (10th Cir. 1984).

Claimant testified that she had to stop working on November 2, 1991, primarily due to pain and numbness in her right shoulder, arm, hand, head, neck, back, and knee, and the fact that she could not stay on her feet over 30-40 minutes without sitting down. (TR 44, 47, 117-118). She stated that she can only walk for 15 minutes at a time and stand for about 5 minutes (TR 47). She testified she can lift 5 pounds with her left hand and 2-3 pounds with her right (TR 47).

Claimant stated that three fingers of her right hand are completely numb and her wrist is weak (TR 47). On her right side she cannot pick up anything small or do any bending of her wrist or twisting of her arm (TR 47-48). She testified that she cannot write with her right hand, fasten buttons, do her hair, or peel potatoes (TR 61). She stated that she had arthroscopic surgery on her right knee in January 1990, laminectomy and spinal surgery in April 1990, and repeat spinal surgery in May 1991 (TR 50). She stated that she sees Dr. David Krug once a month and that he didn't put any restrictions on her, except that she "couldn't lift very much." (TR 48).

In April of 1991, Dr. Richard Tenney reported that he had done a neurosurgical

evaluation to determine the cause of claimant's cervical discomfort and pain and numbness in her right forearm and hand (TR 164). The doctor noted that she had had surgery for a syrinx of the cervical spinal cord the previous year for similar complaints which did not improve her condition (TR 164). The doctor stated: "there is break away weakness at all joints bilaterally in the arms, but there does appear to be a definite weakness of grip bilaterally and possibly at the elbows bilaterally and there appears to be a poor, fine motor coordination in the fingers of the right hand. No motor deficits were detected in the lower extremities. Sensation is intact throughout both arms, hands, shoulders, trunk, legs and feet to pin." (TR 165). An MRI was done (TR 165).

On May 7, 1991, the doctor reported that the MRI showed "a significant reaccumulation of the syrinx from C2-3 level to C5-6 level with moderate distention of the spinal cord from the large syrinx formation. At C3-4 and C4-5, the cord is very thin. There is no gadolinium enhancement seen, therefore, there is no evidence of tumor formation." (TR 163). The doctor determined that the syrinx had reaccumulated because the drain inserted earlier had occluded, and he recommended reinsertion of a drainage tube to halt deterioration (TR 163). The surgery was done, but on June 10, 1991, claimant reported that her left arm and fingers were still numb, and her right shoulder was weak and hurt when she raised her arm (TR 162). The doctor noted the numbness and pain had improved, but that an orthopedist should examine her regarding bursitis in the right shoulder (TR 162).

Claimant saw an orthopedist, who injected her shoulder, but on July 10, 1991, she told Dr. Tenney she still had shoulder pain and numbness of her fingers and the doctor

found "moderate break away weakness at the elbow" and "decreased appreciation of pin prick" in the fingers (TR 161). A bone scan on October 28, 1991 showed no shoulder abnormality (TR 184). An MRI on November 25, 1991, showed that the syrinx had decreased (TR 187).

On December 9, 1991, Dr. Tenney reported that the shunt was draining the syrinx adequately, so no further surgery was required, but that pain and numbness continued, was "no doubt related to the syrinx," and pain medication would be prescribed (TR 160). Dr. Jerome Wade, a neurologist, also found give away weakness and reduced sensation on November 20, 1991 and December 19, 1991 (TR 193-198). He suggested she might have "possible psychological overlay," but he stated an EMG nerve conduction evaluation and physical therapy should be done and he needed her past records to make an evaluation (TR 197-198).

A year later, on December 2, 1992, Dr. Tenney found that claimant's symptoms had increased in severity and her entire right hand and two fingers of the left hand were numb (TR 159). He found moderate break away weakness in both arms and noted that she could not raise her arms up to horizontal without increased pain (TR 159). During 1992, Dr. Krug noted that claimant had pain in her right knee, shoulders, and right wrist and numbness in her fingers and that pain medications did not reduce her pain (TR 134). He diagnosed her as having tennis elbow, possible carpal tunnel syndrome, bursitis, and possibly fibromyositis (TR 134-136). On October 30, 1992, Dr. Yale Andelman, a rheumatologist, concluded she had fibromyalgia (TR 211).

There is merit to claimant's contention. When the ALJ found that claimant could

perform light/sedentary work, he still bore the burden of showing work exists in the national economy which she could perform. 42 U.S.C. § 423(d)(2)(A). He erred in relying on the Medical Vocational Guidelines ("grids") as a framework for decisionmaking, because it is clear she could not perform a substantial majority of jobs under the light work category. Campbell v. Bowen, 822 F.2d 1518, 1522-23 (10th Cir. 1987). Light work involves "lifting no more than 20 pounds at a time with frequent lifting or carrying of objects weighing up to 10 pounds [A] job is in this category when it requires a good deal of walking or standing, or when it involves sitting most of the time with some pushing and pulling of arm or leg controls." 20 C.F.R. § 404.1567(b). To the extent the ALJ relied on the grids, the reliance was improper. He was to elicit testimony of the vocational expert to determine erosion of the job base. The vocational expert clearly concluded that claimant would not be able to perform any jobs if her testimony was found credible and supported by medical evidence.⁴

⁴ The vocational expert testified as follows:

Q Let's assume that we have an individual who is 50 years old, 50 year old female, 12th grade education, plus one year of the Oklahoma School of Business, accounting, in that regard good ability to read and write and use numbers. For the purpose of this hypothetical, I'd like you to assume that the testimony of the claimant, as given at the hearing today, is found to be credible and substantially verified by third party medical evidence, which is a part of the record and without any significant contradictions, would this individual be able to return to any of her past relevant work, either as she has described it or as that work is customarily performed?

A No, she wouldn't.

Q Can you identify any occupations at any exertional and/or skill level, which such an individual could perform?

A No, she wouldn't, I don't think there'd be any jobs she could perform, according to her testimony, concerning her inability to stand and walk or stand 15, walk, I'm sorry, 15 minutes at a time, stand three to five minutes at a time and lift more than five pounds with her left hand or two to three pounds with her right hand. That would eliminate any medium or light jobs she could perform, if she couldn't stand and walk six hours out of an eight hour day and lift up to 25 to 50 pounds. Additionally, her testimony concerning the difficulty with her right hand, inability to use it to fasten buttons, do almost any type of activity with her right hand, would eliminate any sedentary work that she would be able to do. She evidently has limited to no use of the right hand and sedentary work would require her to have good use of her hands to perform. Also she would have to be able to lift up to 10 pounds to perform sedentary work.

....

While the ALJ found the claimant's complaints were not credible because she did not use any ambulation assistive device, had not been recommended or sought any psychological counseling, was not on a regular regime of strong pain medication, had undergone extensive inpatient and outpatient testing without significant positive findings, did not utilize any non-medication pain relief modalities, had no side effects from medication, and took daily walks and did light housework (TR 18-19), the numerous physicians she has seen have all reported that she has numbness in her right hand and weakness in her arms and shoulders. The ALJ's finding of a claimant's noncredibility does not compel a finding of no disability. Thompson v. Sullivan, 987 F.2d 1482, 1491 (10th Cir. 1993). The ALJ failed to state the reasons he did not give substantial weight to the findings of claimant's treating physicians, as required by Castellano v. Secretary of Health & Human Servs., 26 F.3d 1027, 1029 (10th Cir. 1994). The clear weight of the evidence

Q Now, the Administrative Law Judge had talked about, in the last question, the claimant's testimony being truthful and verified, what was the most important basis of your answers to that question?

A I think the primary basis for my answer was her testimony concerning the limited use of her right hand as, she testified as to her ability to use it to write her name, fasten buttons, fix her hair, things of that nature, personal self-care that she had difficulty with, using her right hand.

Q Okay. Would that affect her ability to perform her past work?

A Oh, yes, it would.

Q Would it preclude it?

A Yes, her past work involved taking apart and putting together doorknobs and using tools, yes, it would.

Q Okay. What about the production coordinator job?

A Yes, she would still have to be able to lift and carry parts to other, other workers --

Q So if we were to just have to take into consideration the limited use of the right hand, would that preclude all work?

A From her testimony, it appears that it would, yes.

(TR 70-73).

shows that she has limited use of her right hand and the vocational expert's testimony supports a finding of disability based on that limitation.

The decision of the ALJ is not supported by substantial evidence. The decision is reversed and claimant is found to be disabled and entitled to disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

Dated this 6th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:galloway

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

F I L E D

OCT 12 1995 *JL*

GARY E. STRICKLAND,)
)
 Plaintiff,)

Richard M. Lawrence, Clerk
U.S. DISTRICT COURT

v.)

Case No. 94-C-999-W ✓

SHIRLEY S. CHATER,)
 COMMISSIONER OF SOCIAL)
 SECURITY,¹)
)
 Defendant.)

ENTERED ON DOCKET

DATE 10-16-95

ORDER

Plaintiff brought this action pursuant to 42 U.S.C. § 405(g) for judicial review of the final decision of the Secretary of Health and Human Services ("Secretary") denying plaintiff's application for disability insurance benefits under §§ 216(i) and 223 of the Social Security Act, as amended.

The procedural background of this matter was summarized adequately by the parties in their briefs and in the decision of the Administrative Law Judge ("ALJ"), which summaries are incorporated herein by reference.

The issues now before the court are whether claimant was denied his right to a review by the Appeals Council and whether the Social Security Administration acted in bad faith in processing his application.

Plaintiff's application for benefits was denied by the ALJ on December 8, 1993, and he received his notice of the denial the next day. On February 4, 1994, he requested

¹Effective March 31, 1995, the functions of the Secretary of Health and Human Services in social security cases were transferred to the Commissioner of Social Security. P.L. No. 103-296. Pursuant to Fed.R.Civ.P. 25(d)(1), Shirley S. Chater, Commissioner of Social Security, is substituted for Donna E. Shalala, Secretary of Health and Human Services, as the Defendant in this action. Although the court has substituted the Commissioner for the Secretary in the caption, the text of this Order will continue to refer to the Secretary because she was the appropriate party at the time of the underlying decision.

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review of the decision and on February 18, 1994 he requested the opportunity to file a brief and asked that he be allowed until May 1, 1994 to file it "to allow time to obtain a transcript of the hearing forming the basis of the appeal." He requested a copy of the record on that date also. His request was granted. On February 18, March 14, and April 14, 1994, he sought extensions of time to submit new evidence and received the extensions. He submitted new evidence on April 14 and April 28, 1994. On April 28, 1994, he requested another extension of time until August 15, 1994 to file his brief. He received a letter from a hearing analyst on June 1, 1994, with a tape of the hearing and the exhibits enclosed, which stated that the cost of a typed hearing transcript was \$75.00. He requested a typed transcript on June 17, 1994, and enclosed a check for \$75.00. On August 15, 1994, he requested another extension of time to file his brief until thirty days after receipt of the typed transcript, but ten days later, on August 25, 1994, the Appeals Council denied his request for review.

Under the social security regulations, if a claimant is dissatisfied with an ALJ's decision, he may request that the Appeals Council review the ALJ's decision. 20 C.F.R. §§ 404.967-68. The Appeals Council may either review the ALJ's decision on the merits or deny the claimant's request for review. 20 C.F.R. § 404.981. The decision of the Appeals Council, or the decision of the ALJ if the Appeals Council denies review, then becomes the final decision of the Secretary for purposes of judicial review. 20 C.F.R. § 404.981. The Social Security Act and regulations do not require the preparation of a written transcript prior to a claimant's exhaustion of administrative remedies; under 42 U.S.C. § 405(g), a certified transcript need not be filed until the filing of the Secretary's answer.

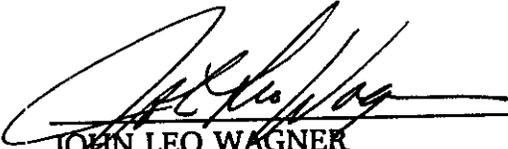
The social security regulations provide that a party is to receive a reasonable opportunity to file briefs or other written statements about the relevant facts and law. 20 C.F.R. §404.975. Plaintiff received numerous extensions of time to submit new evidence and lengthy extensions to file his brief. On June 1, 1994, he received a duplicate cassette of the hearing which could be played on a standard cassette player and copies of the exhibits. Thus, he had access to the hearing record for almost three months before the Appeals Council made its decision. The court also notes that he was present at that hearing. He has failed to explain why he could not prepare a meaningful brief simply because he did not have a written transcript, when he had in his possession an oral recording of the hearing. It is clear that he had access to the hearing record and could have prepared an adequate brief had he chosen to do so. There is no merit to plaintiff's contention that he was denied his right to review by the Appeals Council.

There is also no merit to his second claim that the Social Security Administration acted in bad faith in processing his application. A person alleging the impropriety or bad faith of an administrative tribunal "must overcome a presumption of honesty and integrity in those serving as adjudicators." Hicks v. City of Watonga, Okla., 942 F.2d 737, 746 (10th Cir. 1991) (quoting Withrow v. Larkin, 421 U.S. 35, 47 (1975)). In a case where the plaintiff complained of the system of processing disability claims, the Supreme Court stated that allegations of bad faith by the hearing examiner "assume[d] too much and would bring down too many procedures designed and working well, for a government structure of great and growing complexity." Richardson v. Perales, 402 U.S. 389, 410 (1971). Plaintiff's application was processed correctly, plaintiff received a cassette

recording of the hearing at no cost, and he was given many extensions of time to complete his record and brief his case. He cannot place the blame for his lack of diligence on the system.

The decision of the Appeals Council is affirmed.

Dated this 12th day of October, 1995.



JOHN LEO WAGNER
UNITED STATES MAGISTRATE JUDGE

S:stick

On July 14, 1995, Armando De Leon Compean appeared in person and with his counsel, but offered no evidence in his own behalf. The Court, after carefully reviewing the evidence, including the Declaration of Keith Loken, Attorney Adviser in the Office of the Legal Adviser for the Department of State, Washington, D.C., and having had an opportunity to observe the physical characteristics of Armando De Leon Compean as compared with the evidence of identification before the Court, and having received the stipulation that Armando De Leon Compean is one and the same person as requested for extradition by the government of the United Mexican States, concluded that (1) there was probable cause to believe that Armando De Leon Compean, who is before this Court, is the same person who is the fugitive for whom the warrants of arrest have been issued and who is the subject of the extradition request; however, (2) there was not sufficient evidence to establish probable cause to believe that Armando De Leon Compean is the same person who committed the offenses for which his extradition is sought.

Therefore, upon the request of the government of the United Mexican States, the Court determined that an additional thirty (30) days should be granted to the government of the United Mexican States within which to provide additional evidence that there is probable cause to believe that Armando De Leon Compean is the same person who committed the offenses for which his extradition is sought, and that during this interim period Armando De Leon Compean should be detained in custody pending a further hearing. At this

time the Court ordered that a hearing on the status of the matter be set for August 11, 1995.

On August 11, 1995, the government of the United Mexican States appeared by and through its attorney, F. L. Dunn, III, Assistant United States Attorney, and Armando De Leon Compean appeared in person and with his counsel, Stephen J. Knorr, at which time the Court, upon the representation of F. L. Dunn, III, that further evidence was in the process of being transmitted to the Court, passed the hearing to August 18, 1995. On August 18, 1995, the government of the United Mexican States appeared by and through its attorney, F. L. Dunn, III, Assistant United States Attorney, and Armando De Leon Compean appeared in person and with his counsel, Stephen J. Knorr, at which time the Court, upon the offer of the government, received as evidence the authenticated documents submitted by the government of the United Mexican States in further support of its request for the extradition of Armando De Leon Compean. Thereafter, and upon the agreement of the government and the attorney for Armando De Leon Compean, a hearing on the request for extradition was set for September 5, 1995.

On September 5, 1995, the government of the United Mexican States appeared by and through its attorney, F. L. Dunn, III, Assistant United States Attorney, and Armando De Leon Compean appeared in person and with his counsel, Stephen J. Knorr, at which time the Court heard the testimony of one witness on behalf of the government, no evidence being offered on behalf of Armando De Leon Compean, and heard and considered arguments on behalf of each of

the parties. Thereafter, the Court, with agreement of each party, set the matter for decision on October 11, 1995, each party being given opportunity to submit any further brief as deemed necessary.

On October 11, 1995, the government of the United Mexican States appeared by and through its attorney, F. L. Dunn, III, Assistant United States Attorney, and Armando De Leon Compean appeared in person and with his counsel, Stephen J. Knorr, at which time the Court, after carefully reviewing all of the evidence submitted on behalf of the government of the United Mexican States, reviewing the motions and briefs filed on behalf of Armando De Leon Compean, and after hearing and considering the arguments and statements of counsel on behalf of the parties, and being otherwise fully advised in the premises,

Found as follows:

1. the undersigned judicial officer is authorized under Title 18, United States Code, Section 3184, to conduct an extradition hearing;
2. the Court has personal jurisdiction over the fugitive, Armando De Leon Compean, and subject matter jurisdiction over the case;
3. there is currently in force an extradition treaty between the United States and the United Mexican States;
4. the fugitive has been charged in the requesting state with the crimes of homicide upon which warrants of arrest have been issued for Armando De Leon Compean;

5. these charges constitute extraditable offenses within the meaning of the Extradition Treaty between the United States of America and the United Mexican States of May 4, 1978;

6. the requesting state seeks extradition of the fugitive, Armando De Leon Compean, for trial for these offenses;

7. there is probable cause to believe that Armando De Leon Compean, who is before this Court, is the same person who is the fugitive for whom the warrants of arrest have been issued and who is the subject of the extradition request; and,

8. there is probable cause to believe that Armando De Leon Compean is the same person who committed the offenses for which his extradition is sought.

Wherefore, based upon the foregoing findings, the Court concludes that Armando De Leon Compean is extraditable for each offense for which extradition is being requested by the United Mexican States, and hereby certifies this finding to the Secretary of State of the United States as required under Title 18, United States Code, Section 3184.

IT IS THEREFORE ORDERED by the Court that a certified copy of this Certification of Extraditability and Order of Commitment be forwarded without delay by the Clerk to the Department of State, to the attention of the Office of the Legal Adviser;

AND, IT IS FURTHER ORDERED by the Court that Armando De Leon Compean be and he is hereby committed to the custody of the United States Marshal for this District pending final disposition of this matter by the Secretary of State and his surrender to designated

agents of the Government of the United Mexican States pursuant to applicable provisions of the Treaty and law.

Dated this 11 day of October, 1995.

S/Frank H. McCarthy
U.S. Magistrate

FRANK H. MCCARTHY
UNITED STATES MAGISTRATE JUDGE

FILED

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA** OCT 12 1995

HOMEWARD BOUND, INC., et. al.,)
)
Plaintiffs,)
)
vs.)
)
THE HISSOM MEMORIAL CENTER, et. al.,)
)
Defendants.)

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

Case No: 85-C-437-E

ENTERED ON DOCKET
DATE 10-13-95

ORDER & JUDGMENT

Plaintiffs' counsel, Bullock & Bullock, filed an Attorney Fee Application on June 6, 1995 for an award of attorney fees and expenses in accordance with the December 23, 1989 order and stipulation of the parties.

The Court has entered an order of September 21, 1995 regarding the contested fees and hereby awards the firm Bullock & Bullock contested attorney fees in the amount of \$1,485.00.

IT IS THEREFORE ORDERED that the Department of Human Services shall pay Plaintiffs' counsel, Bullock & Bullock, attorney fees in the amount of \$1,485.00, and a judgment in the amount of \$1,485.00 is hereby entered on this day.

ORDERED this 12 day of Oct, 1995.

S/ JAMES O. ELLISON

JAMES O. ELLISON
United States District Court



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ATTORNEYS FOR DEFENDANTS

(ORDER.FEE)

UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
vs.)
)
BEVERLY A. RANDOL pka BEVERLY)
A. MARTIN; UNKNOWN SPOUSE, IF)
ANY OF BEVERLY A. RANDOL;)
OLVRY DEAN RANDOL; COUNTY)
TREASURER, Tulsa County, Oklahoma;)
BOARD OF COUNTY)
COMMISSIONERS, Tulsa County,)
Oklahoma,)
)
Defendants.

ENTERED ON DOCKET
~~OCT 9 1995~~
DATE ~~OCT 13 1995~~

FILED

OCT 12 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

Civil Case No. 95-C 91K

JUDGMENT OF FORECLOSURE

This matter comes on for consideration this 12 day of October,

1995. The Plaintiff appears by Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney; the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, appear by Dick A. Blakeley, Assistant District Attorney, Tulsa County, Oklahoma; and the Defendants, BEVERLY A. RANDOL pka BEVERLY A. MARTIN, UNKNOWN SPOUSE OF BEVERLY A. RANDOL, if any, and OLVRY DEAN RANDOL, appear not, but make default.

The Court being fully advised and having examined the court file finds that BEVERLY A. RANDOL pka BEVERLY A. MARTIN will hereinafter be referred to as ("BEVERLY A. RANDOL").

NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.

The Court further finds that the Defendants, BEVERLY A. RANDOL, UNKNOWN SPOUSE OF BEVERLY A. RANDOL, and OLVRY DEAN RANDOL, were served by publishing notice of this action in the Tulsa Daily Commerce & Legal News, a newspaper of general circulation in Tulsa County, Oklahoma, once a week for six (6) consecutive weeks beginning July 20, 1995, and continuing through August 24, 1995, as more fully appears from the verified proof of publication duly filed herein; and that this action is one in which service by publication is authorized by 12 O.S. Section 2004(c)(3)(c). Counsel for the Plaintiff does not know and with due diligence cannot ascertain the whereabouts of the Defendants, BEVERLY A. RANDOL, UNKNOWN SPOUSE OF BEVERLY A. RANDOL, if any, and OLVRY DEAN RANDOL, and service cannot be made upon said Defendants within the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, or upon said Defendants without the Northern Judicial District of Oklahoma or the State of Oklahoma by any other method, as more fully appears from the evidentiary affidavit of a bonded abstracter filed herein with respect to the last known addresses of the Defendants, BEVERLY A. RANDOL, UNKNOWN SPOUSE OF BEVERLY A. RANDOL, if any, and OLVRY DEAN RANDOL. The Court conducted an inquiry into the sufficiency of the service by publication to comply with due process of law and based upon the evidence presented together with affidavit and documentary evidence finds that the Plaintiff, United States of America, acting through the Secretary of Housing and Urban Development, and its attorneys, Stephen C. Lewis, United States Attorney for the Northern District of Oklahoma, through Loretta F. Radford, Assistant United States Attorney, fully exercised due diligence in ascertaining the true name and identity of the parties served by publication with respect to their present or last known places of residence

and/or mailing addresses. The Court accordingly approves and confirms that the service by publication is sufficient to confer jurisdiction upon this Court to enter the relief sought by the Plaintiff, both as to subject matter and the Defendants served by publication.

It appears that the Defendants, COUNTY TREASURER, Tulsa County, Oklahoma, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, filed their Answer on February 9, 1995; and that the Defendants, BEVERLY A. RANDOL, UNKNOWN SPOUSE OF BEVERLY A. RANDOL, if any, and OLVRY DEAN RANDOL, have failed to answer and their default has therefore been entered by the Clerk of this Court.

The Court further finds that this is a suit based upon a certain mortgage note and for foreclosure of a mortgage securing said mortgage note upon the following described real property located in Tulsa County, Oklahoma, within the Northern Judicial District of Oklahoma:

**LOTS TWENTY-SEVEN (27) AND TWENTY-EIGHT (28),
BLOCK NINE (9), AMENDED FOREST PARK ADDITION
TO THE CITY OF TULSA, TULSA COUNTY, STATE OF
OKLAHOMA, ACCORDING TO THE RECORDED PLAT
THEREOF.**

A/K/A 1312 SO. TRENTON, TULSA, OK. 74120

The Court further finds that on January 28, 1987, the Defendants, OLVRY DEAN RANDOL and BEVERLY A. RANDOL, executed and delivered to FIRSTIER MORTGAGE CO. their mortgage note in the amount of \$59,400.00, payable in monthly installments, with interest thereon at the rate of eight and one-half percent (8.5%) per annum.

The Court further finds that as security for the payment of the above-described note, the Defendants, OLVRY DEAN RANDOL and BEVERLY A. RANDOL, Husband and Wife, executed and delivered to FIRSTIER MORTGAGE CO. a mortgage dated January 28, 1987, covering the above-described property. Said mortgage was recorded on February 5, 1987, in Book 5000, Page 702, in the records of Tulsa County, Oklahoma.

The Court further finds that on June 6, 1988, FirstTier Mortgage Co., (formerly known as Realbanc, Inc.) assigned the above-described mortgage note and mortgage to LEADER FEDERAL SAVINGS & LOAN ASSOCIATION. This Assignment of Mortgage was recorded on September 19, 1988, in Book 5128, Page 2854, in the records of Tulsa County, Oklahoma.

The Court further finds that on October 4, 1989, LEADER FEDERAL BANK FOR SAVINGS assigned the above-described mortgage note and mortgage to the SECRETARY OF HOUSING AND URBAN DEVELOPMENT OF WASHINGTON, D.C., his successors in office and assigns. This Assignment of Mortgage was recorded on November 2, 1989, in Book 5217, Page 1646, in the records of Tulsa County, Oklahoma. However, this assignment is defective because it doesn't state that the grantor entity was formerly known as Leader Federal Savings & Loan Association.

The Court further finds that on February 18, 1992, Leader Federal Bank for Savings, fka Leader Federal Savings and Loan Association executed a corrected Assignment of Mortgage in favor of the SECRETARY OF HOUSING AND URBAN DEVELOPMENT, 451 SEVENTH STREET, SW, WASHINGTON, DC, 20410, his successors in office and assigns. This Assignment of Mortgage was recorded on February 21, 1992, in Book 5382, Page 1122, in the records of Tulsa County, Oklahoma.

The Court further finds that on September 5, 1989, the Defendant, BEVERLY A. RANDOL, entered into an agreement with the Plaintiff lowering the amount of the monthly installments due under the note in exchange for the Plaintiff's forbearance of its right to foreclose.

The Court further finds that the Defendants, BEVERLY A. RANDOL and OLVRY DEAN RANDOL, made default under the terms of the aforesaid note and mortgage, as well as the terms and conditions of the forbearance agreements, by reason of their failure to make the monthly installments due thereon, which default has continued, and that by reason thereof the Defendants, BEVERLY A. RANDOL and OLVRY DEAN RANDOL, are indebted to the Plaintiff in the principal sum of \$87,332.05, plus interest at the rate of 8.5 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the legal rate until fully paid, and the costs of this action.

The Court further finds that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, has a lien on the property which is the subject matter of this action by virtue of personal property taxes in the amount of \$34.00 which became a lien on the property as of June 26, 1992; a lien in the amount of \$19.00 which became a lien as of June 25, 1993; and a lien in the amount of \$20.00 which became a lien as of June 23, 1994. Said liens are inferior to the interest of the Plaintiff, United States of America.

The Court further finds that the Defendants, BEVERLY A. RANDOL, UNKNOWN SPOUSE OF BEVERLY A. RANDOL, if any, and OLVRY DEAN RANDOL, are in default, and have no right, title or interest in the subject real property.

The Court further finds that the Defendant, BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, claims no right, title or interest in the subject real property.

The Court further finds that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the Plaintiff, the United States of America, acting on behalf of the Secretary of Housing and Urban Development, have and recover judgment in rem against the Defendants, OLVRY DEAN RANDOL and BEVERLY A. RANDOL, in the principal sum of \$87,332.05, plus interest at the rate of 8.5 percent per annum from November 1, 1994 until judgment, plus interest thereafter at the current legal rate of 5.52 percent per annum until paid, plus the costs of this action, plus any additional sums advanced or to be advanced or expended during this foreclosure action by Plaintiff for taxes, insurance, abstracting, or sums for the preservation of the subject property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, have and recover judgment in the amount of \$73.00, plus costs and interest, for personal property taxes for the years 1991-1993, plus the costs of this action.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Defendants, BEVERLY A. RANDOL, UNKNOWN SPOUSE OF BEVERLY A. RANDOL, if any, OLVRY DEAN RANDOL, and BOARD OF COUNTY COMMISSIONERS, Tulsa County, Oklahoma, have no right, title, or interest in the subject real property.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that upon the failure of said Defendants, BEVERLY A. RANDOL and OLVRY DEAN RANDOL, to satisfy the in rem judgment of the Plaintiff herein, an Order of Sale shall be issued to the United States Marshal for the Northern District of Oklahoma, commanding him to advertise and sell according to Plaintiff's election with or without appraisal the real property involved herein and apply the proceeds of the sale as follows:

First:

In payment of the costs of this action accrued and accruing incurred by the Plaintiff, including the costs of sale of said real property;

Second:

In payment of the judgment rendered herein in favor of the Plaintiff;

Third:

In payment of Defendant, COUNTY TREASURER, Tulsa County, Oklahoma, in the amount of \$73.00, personal property taxes which are currently due and owing.

The surplus from said sale, if any, shall be deposited with the Clerk of the Court to await further Order of the Court.

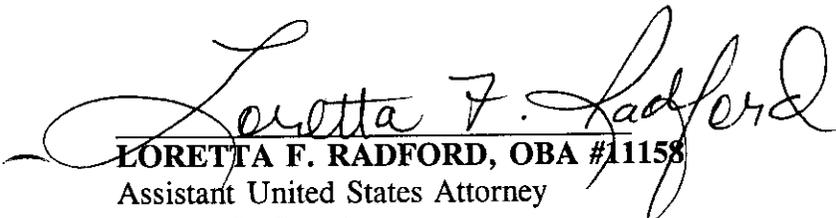
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that pursuant to 12 U.S.C. 1710(1) there shall be no right of redemption (including in all instances any right to possession based upon any right of redemption) in the mortgagor or any other person subsequent to the foreclosure sale.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that from and after the sale of the above-described real property, under and by virtue of this judgment and decree, all of the Defendants and all persons claiming under them since the filing of the Complaint, be and they are forever barred and foreclosed of any right, title, interest or claim in or to the subject real property or any part thereof. **s/ TERRY C. KERN**

UNITED STATES DISTRICT JUDGE

APPROVED:

STEPHEN C. LEWIS
United States Attorney


LORETTA F. RADFORD, OBA #11158
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Attorney for Defendants,
County Treasurer and
Board of County Commissioners,
Tulsa County, Oklahoma

Judgment of Foreclosure
Civil Action No. 95-C 91K
LFR/lg

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH HAMILTON, on behalf of)
himself and all other)
employees of the Tulsa County)
Public Facilities Authority,)
similarly situated,)

Plaintiff,)

vs.)

TULSA COUNTY PUBLIC)
FACILITIES AUTHORITY,)

Defendant.)

ENTERED ON DOCKET
DATE OCT 13 1995

No. 94-C-1159-K

FILED

OCT 12 1995

ORDER

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

Now before the Court are the cross-motions by Plaintiff and Defendant Tulsa County Public Facilities Authority ("TCPFA") for summary judgment. Plaintiff brings this action on behalf of himself and all other employees of the Defendant similarly situated, those being George Bradley, Rosalee Wood and Eddie Ray Tearl. All of the plaintiffs were employees of the TCPFA.

Plaintiff filed suit in the United States District Court for the Northern District of Oklahoma to recover unpaid overtime compensation, liquidated damages and costs under the provisions of § 16 (b) of the Fair Labor Standards Act of 1938 as amended (29 U.S.C.S. §216 (b)), hereinafter referred to as the "Act".

Defendant moves for summary judgment on the grounds that Plaintiff's claims are without merit because the Defendant is and was statutorily exempt from paying overtime to its employees pursuant to 29 U.S.C. §213(a)(3). Hamilton, Bradley and Tearl performed maintenance work for the TCPFA at the Fairgrounds; Wood

was a security guard at the Fairgrounds. The U.S. Department of Labor has previously denied a claim by Wood for overtime pay on the basis that the TCPFA is exempt as a recreation/amusement establishment.

The TCPFA is a public trust with Tulsa County as the beneficiary, and manages the Tulsa County Fairgrounds. The Defendant provides use of the Fairgrounds by the public for various events, including horse racing (Fair Meadows), the Tulsa State Fair, the circus and various shows. The TCPFA also sublets part of the Fairgrounds for use as a baseball field (Tulsa Drillers), amusement park (Bell's Amusement Park) and as a water park (Big Splash). One fairground building is also leased for a retail shoe operation (Bob's Shoe Warehouse).

The Plaintiffs were employees of and paid by the TCPFA. Kenneth Hamilton drove a truck as part of a central maintenance crew. He hauled asphalt, crushed rock and gravel, and placed barbed wire, among other duties for Big Splash, Bell's Amusement Park, and Driller Park, among others at the Fairgrounds. George Bradley was employed as a landscaper by the Defendant. He also worked as a central maintenance worker. Eddie Ray Tearl drove a tractor in his employment with Defendant. Rosalee Wood worked as a security guard at Bob's Shoe Warehouse.

Summary judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The Court must view the evidence and draw any inferences in a light most

favorable to the party opposing summary judgment, but that party must identify sufficient evidence which would require submission of the case to a jury. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-52 (1986). Where the nonmoving party will bear the burden of proof at trial, that party must "go beyond the pleadings" and identify specific facts which demonstrate the existence of an issue to be tried by the jury. Mares v. ConAgra Poultry Co., Inc., 971 F.2d 492, 494 (10th Cir. 1992).¹

DISCUSSION

I. IS DEFENDANT AN AMUSEMENT AND RECREATIONAL ESTABLISHMENT, THEREFORE EXEMPT FROM PAYING OVERTIME TO ITS EMPLOYEES?

In order for Plaintiffs to maintain an action against Defendant, it must be established that Defendant is not statutorily exempt from paying overtime to its employees under the amusement and recreation establishment exception. As a general rule, employers under the Act must pay their employees overtime compensation which is 1 1/2 times their regular rate of pay for any hours worked in excess of 40 hours per week. 29 U.S.C. 207(a). However, employers which operate amusement or recreational establishments are exempt from this requirement. 29 U.S.C. §213(a)(3) provides:

"any employee employed by an establishment which is an amusement or recreational establishment...(A) which does not operate for more than seven months in any calendar

¹While the FLSA provides the right to jury trial, in this case the parties have agreed to proceed before the Court should trial be necessary.

year, or (B) during the preceding calendar year, its average receipts for any six months of such year were not more than 33 1/3 per centum of its average receipts for the other six months of such year"

is exempt from paying overtime to its employees.

It is undisputed Defendant's average receipts for any six months a year are not more than 33 1/3 percent of its average receipts for the other six months of the year, i.e., the first six months of the TCPFA fiscal year (July-December) account for over 75% of total revenues. (Defendant's Brief at 2, ¶6; Affidavit of Jeff Burrow, Exhibit B). To determine whether Defendant falls within the "amusement and recreational establishment" exemption, the terms must be defined. The Act does not give a definition of "amusement" or "recreational". Federal regulations provide, not helpfully, that amusement or recreational establishments "are establishments frequented by the public for its amusement or recreation..." 29 C.F.R. §779.385. The regulation cites concessionaires at amusement parks as an example. *Id.* See also Jeffery v. Sarasota White Sox, Inc., 1995 WL 514459 (11th Cir.1995).

Case law also characterizes an amusement park as an "amusement and recreational establishment". *Brennan v. Texas City Dike & Marina, Inc.*, 492 F.2d 1115, 1118 (5th Cir. 1974), cert. den. 419 U.S. 896 (1974), citing various Department of Labor Wage & Hour Opinion Letters. The legislative history used to interpret and apply the exemption suggested that "the exemption does not cover establishments whose sole or primary activity is selling goods" but

instead covers those which derive the majority of their income from amusement or recreational activities. For example, the exemption applied to "hotels, motels, restaurants, and movie theaters...amusement parks, carnivals, circuses, sports events...". *Id.* See also, *Brock v. Louvers and Dampers, Inc.*, 817 F.2d 1255, 1258 (6th Cir. 1987), citing House of Representatives' Report No. 871 relating to a proposed amendment to the FLSA.

The Defendant manages the Tulsa County Fairgrounds and its primary purpose is to establish, provide, maintain and promote recreational centers, agricultural and industrial expositions, fairs, trade shows, and other recreational facilities and activities. Defendant also provides use of the Fairgrounds for various events, including horse racing, the Tulsa State Fair, the circus and various shows. The Defendant sublets parts of the Fairgrounds for use as a baseball field, amusement park and water park. See Defendant's Brief in Support of Motion for Summary Judgment, Affidavit, Exhibit "A". More than 50% of the Defendant's income is derived from monies collected in recreation or amusement activities. See Defendant's Brief in Support of Motion for Summary Judgment, Burrow Affidavit, Exhibit "B". Based on these undisputed facts and the terms of §213(a)(2), the Defendant argues it should be considered a "recreational or amusement establishment".

In response, Plaintiffs argue that the character of Plaintiffs' work precludes them from being exempt, stating "it was never contemplated that full time maintenance workers should be included in the exemption when they are employed at a facility that

has some amusement or recreational characteristic" (Plaintiffs' Response Brief at 5). Exceptions to the FLSA are to be narrowly construed; the employer must show the employees "plainly and unmistakably fit within the terms of the exception". *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960). The Tenth Circuit has also held that "exemptions from the FLSA are to be narrowly construed in favor of the employees." *Nichols v. Hurley*, 921 F.2d 1101, 1103 (10th Cir. 1990); *Brennan v. Dillion*, 483 F.2d 1334 (10th Cir. 1973). The question of how employees spend their time is a question of fact; the question whether their particular activities exclude them from the overtime benefits of the FLSA is a question of law. *Reich v. State of Wyoming*, 993 F.2d 739, 741 (10th Cir.1993).

Plaintiffs rely on *Brennan v. Yellowstone Park Lines, Inc.*, 478 F.2d 285 (10th Cir. 1973), which addresses specifically how far the application of the amusement and recreation exemption should extend. The court held that central maintenance and repair workers who performed functions which served several or all of the company's establishments in the Park were not exempt from the overtime provisions of the FLSA. The court concluded "the distances and the heterogeneous nature of the areas of interest do not lend to the Yellowstone Park enterprises being considered as one integrated unit subject to exemption. . ." *Id.* at 290. Similarly, Plaintiffs wish this Court to hold that Bells Amusement Park, Tulsa Drillers, Big Splash and Bob's Shoe Warehouse are separate enterprises. Plaintiffs also rely on the holding of

Brennan v. Six Flags Over Georgia, Ltd., 474 F.2d 18 (5th Cir. 1973). The court in *Six Flags* held that it is the "character of the work, not the source of the remuneration, that controls". *Id.* at 19. That court also stated that the exemption is not a subsidy accorded to an employer because of his principal activities. *Id.*

Plaintiff claims that Defendant's primary revenue comes from managing and maintaining the fairgrounds and acting as a landlord. As noted, it is also claimed that three of the four Plaintiffs are involved in maintenance of the fairgrounds property and one of the Plaintiffs is a security guard. Plaintiffs contend these positions cannot be considered amusement or recreational activity for the purposes of the exemption if the holdings in *Brennan v. Six Flags Over Georgia* and *Brennan v. Yellowstone Parklines, Inc.* are to be followed.

(II) IS DEFENDANT CONSIDERED AN ESTABLISHMENT FOR PURPOSES OF THE EXEMPTION?

Under 29 U.S.C. §213(a)(3), a business must additionally be classified as an "establishment" in order to qualify for the exemption. The Tenth Circuit in *Brennan* held that Yellowstone National Park could not be considered as an establishment within the meaning of the Fair Labor Standards Act exemption for amusement or recreational establishments because of the distance and heterogeneous nature of the areas. The Court cited authority which held that the word "establishment" meant a distinct physical place of business and not an integrated business or enterprise. 478 F.2d at 289, citing *Phillips v. Walling*, 324 U.S. 490 (1945). The court

also cited authority which held that the term "establishment" did not apply to physically separated warehouses even though they were operated as a single economic unit. *Id.* at 289, citing *Mitchell v. Bekins Van & Storage Co.*, 352 U.S. 1027 (1957). The court in *Brennan* denied the exemption as to certain employees, namely central maintenance and repair workers, who perform functions serving several, or all, of the company's establishments of Yellowstone. *Id.* at 290.

Plaintiffs argue the case at hand is similar to *Brennan v. Yellowstone* because Defendant's operation also consists of several different establishments, i.e. Tulsa State Fair and Fair Meadow Racetrack and leases to Bells Amusement Park, Tulsa Drillers, Big Splash and Bob's Shoe Warehouse. Therefore, these operations should be considered separate establishments. Three of the Plaintiffs were central maintenance employees who served many of the establishments.

Defendant responds that in *Brennan v. Yellowstone*, the separate facilities were physically separated by as much as 68 miles; each facility had its own standards; and there were "wide variations in the areas" where the facilities were located. The present case can be distinguished because the structures of the Fairgrounds are not spread out miles apart and are not located in distinctly different areas. Also, unlike Yellowstone Park, there are no hotels or free standing restaurants involved here. The Fairgrounds is used for one primary purpose, recreation and amusement activities. Defendant also relies upon Chaney v. Clark

County Agricultural Society, Inc., 629 N.E.2d 513 (Ohio App.1993), in which the court held a county fairgrounds fell within the overtime exemption.

Performing duties on different locations within the Fairgrounds does not mean that the Defendant was not operating as one establishment. See, *Brennan v. Goose Creek Consolidated Ind. Sch. Dist.*, 519 F.2d 53 (5th Cir.1975). That court noted that the *Brennan* opinion "did not reach the situation where a company's operations at different locations are identical." *Id.* The Court in *Goose Creek* cited examples of operations with more than one location which constituted a single establishment: (a) "a market, liquor store, and restaurant operated in conjunction with a neighboring barbecue stand". See *Mitchell v. Gammill*, 245 F.2d 207 (5th Cir. 1957); (b) food service company operating two cafeterias for a college which were in different locations. See *Wirtz v. Campus Chefs*, 303 F. Supp. 1112 (N.D. Ga. 1968). Plaintiffs' work was in accordance with the purpose of the Defendant, which was to maintain and promote recreational facilities and activities.

Plaintiffs respond that in *Goose Creek* each establishment was operated by one single entity whereas in the present case the different establishments are operated by separately, independently owned entities which are leased by Defendant. These entities are Tulsa Baseball, Inc., Robert K. Bell Enterprises, Expo Water Park, Inc. and Bob's Shoe Warehouse, Inc. Also, even though Plaintiffs are only paid by Defendant, they are working at these separate establishments as central employees serving these separate

establishments. Therefore, plaintiffs persist, the rationale of *Brennan v. Yellowstone* should be applied to this case.

Finally, Plaintiffs argue that Defendant does not fall within the exemption because the employees engaged in maintenance type work which does not fall under amusement or recreation activities. However, the court in *Brennan v. Texas City Dike & Marina, Inc.*, 492 F.2d 1115 (5th Cir.1974) applied the principal activity test to determine eligibility of a facility for the exemption. When the companies activities are multifaceted, it only needs to show that a majority of its income comes from amusement or recreation activities. The court held that the marina which derived 57% of its income from sales was not eligible for the exemption as a recreational or amusement establishment. *Id.* at 1119. In the case at bar, a majority of Defendant's income is derived from the fair and horseracing activities. See Defendant's Brief in Support of Motion for Summary Judgment, "Statement of Undisputed Facts," Para. 6,7.

(III) SHOULD THE COURT LOOK TO THE INDIVIDUAL FUNCTIONS OF EMPLOYEES IN DETERMINING IF THE EXEMPTION APPLIES OR TO THE FUNCTION OF THE EMPLOYER?

The Fifth Circuit has held that the character of the work, not the function of the employer, is used to determine whether or not the exemption applies. *Six Flags Over Georgia*, 474 F.2d at 19. In *Yellowstone Park Lines, Inc.*, the court said "central maintenance and repair workers who perform functions which serve several or all of the company's establishments in the Park" were not within the

exemption. 478 F.2d at 290. Plaintiffs contend this statement indicates the Tenth Circuit also focuses upon the nature of the work. Based on these findings, the Plaintiffs would not be exempt from receiving overtime under the FLSA.

Although not perfectly clear, the Tenth Circuit in Yellowstone appeared to exclude maintenance and repair workers not because of the nature of their work, but because they worked for several distinct establishments. The court said "[w]e concede the applicability of the exemption to all of defendants' employees in the Park, including maids and boiler room workers. . . ." 478 F.2d at 290 (emphasis added). The First Circuit held in *Marshall v. New Hampshire Jockey Club*, 562 F.2d 1323 (1st Cir.1977) that the exemption turns on the nature of the employer's business, not on the nature of the employee's work, expressly disagreeing with Six Flags Over Georgia. *Id.* at 1331 n. 4. This Court agrees with this aspect of the Marshall decision. The language of the exemption, which must govern, describes the nature of the business, not the work performed.

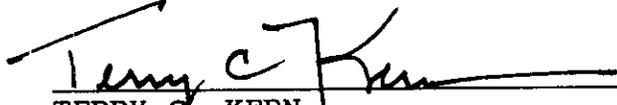
Plaintiffs point again to Rosalee Wood, working as a security guard at a shoe store, "an activity which would not be classified as recreational or amusement." (Plaintiffs' Surreply at 6). Nevertheless, Wood was paid by Defendant. Also, Wood stated in her deposition that the U.S. Department of Labor denied her claim based upon the recreational/amusement exemption.² The Department of

²A copy of the ruling has not been made part of the record. Wood testified she received a letter stating "the fairgrounds was exempt because it was a seasonal facility." (Wood depo. at 41).

Labor's interpretation of the FLSA is entitled to deference. Martin v. Ohio Turnpike Commission, 968 F.2d 606, 611 (6th Cir.1992), cert. denied, 113 S.Ct. 979 (1993). Having concluded the Defendant represents an amusement or recreational establishment, the Court further concludes the exemption of 29 U.S.C. §213(a)(3) also applies.

It is the Order of the Court that the motion of the plaintiff for summary judgment is hereby DENIED and the motion of the defendant for summary judgment is hereby GRANTED.

ORDERED this 12 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

KENNETH HAMILTON, on behalf of)
himself and all other)
employees of the Tulsa County)
Public Facilities Authority,)
similarly situated,)

Plaintiff,)

vs.)

TULSA COUNTY PUBLIC)
FACILITIES AUTHORITY,)

Defendant.)

ENTERED ON DOCKET
DATE OCT 13 1995

No. 94-C-1159-K ✓

FILED

OCT 12 1995

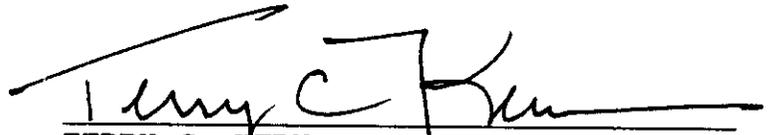
Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

JUDGMENT

This matter came before the Court for consideration of the defendant's motion for summary judgment. The issues having been duly considered and a decision having been rendered in accordance with the Order filed contemporaneously herewith,

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that judgment is hereby entered for the defendant and against the plaintiff.

ORDERED this 12 day of October, 1995.


TERRY C. FERN
UNITED STATES DISTRICT JUDGE

25

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

RANDELL NELSON,)
)
Plaintiff,)
)
v.)
)
DELORES RAMSEY, et al.,)
)
Defendants.)

ENTERED ON DOCKET

DATE ~~OCT 13 1995~~

Case No. 95-C-321-K ✓

FILED

OCT 12 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

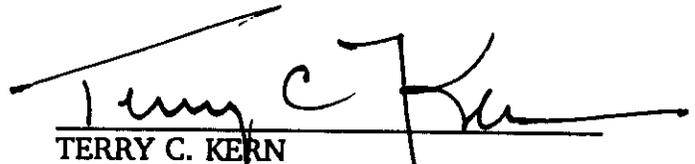
ORDER

The court has for consideration the Report and Recommendation of the Magistrate Judge filed September 12, 1995, in which the Magistrate Judge recommended that Plaintiff's Motion for Appointment of Counsel be denied. No exceptions or objections have been filed and the time for filing such exceptions or objections has expired.

After careful consideration of the record and the issues, the court has concluded that the Report and Recommendation of the Magistrate Judge should be and hereby is affirmed.

IT IS THEREFORE ORDERED that Plaintiff's Motion for Appointment of Counsel is denied.

Dated this 12 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

S:ramsey

15

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

WALTER GEORGE CASE, JR.,
Petitioner,
vs.
LEROY L. YOUNG, et al.,
Respondents.

ENTERED ON DOCKET

DATE OCT 13 1995

No. 94-C-290-K

FILED

OCT 12 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT

ORDER

On July 12, 1995, the Court conditionally granted Petitioner's application for a writ of habeas corpus and ordered that the writ shall issue unless, within sixty (60) days from the date of entry of this opinion, the State has commenced proceedings to permit Petitioner to withdraw his guilty plea. On August 21, 1995, the Tulsa County District Court permitted Petitioner to withdraw his guilty plea. Petitioner then pled guilty to the same charges and was sentenced to thirty years in the Oklahoma Department of Corrections.

Accordingly, the petition for a writ of habeas corpus is hereby **dismissed as moot**.

SO ORDERED THIS 12 day of October, 1995.


TERRY C. KERN
UNITED STATES DISTRICT JUDGE

16

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OKLAHOMA

FILED

OCT 12 1995

Richard M. Lawrence, Clerk
U. S. DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

HELENE SALMON,)
)
Plaintiff,)
)
vs.)
)
BANKERS LIFE AND CASUALTY)
COMPANY, a foreign insurance)
company,)
)
Defendant.)

Case No. 95-C-264-BU

ENTERED ON DOCKET

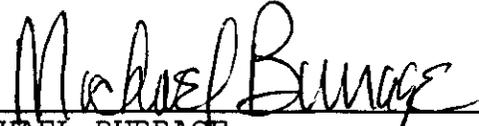
~~DATE OCT 13 1995~~

ADMINISTRATIVE CLOSING ORDER

As the parties have reached a settlement and compromise of this matter, it is ordered that the Clerk administratively terminate this action in his records without prejudice to the rights of the parties to reopen the proceeding for good cause shown, for the entry of any stipulation or order, or for any other purpose required to obtain a final determination of the litigation.

If the parties have not reopened this case within 30 days of this date for the purpose of dismissal pursuant to the settlement and compromise, the plaintiff's action shall be deemed to be dismissed with prejudice.

Entered this 12th day of October, 1995.



MICHAEL BURRAGE
UNITED STATES DISTRICT JUDGE

12



IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARGARET WALKER,)
)
Plaintiff,)
)
v.)
)
GUARDIAN LIFE INSURANCE COMPANY)
OF AMERICA, a foreign)
corporation; GUARDIAN PLAN OF)
GROUP INSURANCE; OUTDOOR CAP)
CO., INC., a foreign)
corporation; and, PRIVATE)
HEALTHCARE SYSTEMS, INC., a)
foreign corporation,)
)
Defendants.)

No. 95-C-167-H

FILED

OCT 11 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ENTERED ON DOCKET

ORDER OF DISMISSAL WITH PREJUDICE DATE OCT 12 1995

NOW ON this 5 day of Oct, 1995, it appearing to the Court that this matter has been compromised and settled, this case is herewith dismissed with prejudice to the refiling of a future action.

SI SVEN ERIK HOLMES

United States District Judge

334\67\dwp.eld\PTB

NOTE: THIS ORDER IS TO BE MAILED BY MOVANT TO ALL COUNSEL AND PRO SE LITIGANTS IMMEDIATELY UPON RECEIPT.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

MARGARET WALKER,)
)
Plaintiff,)

v.)

No. 95-C-167-H

GUARDIAN LIFE INSURANCE COMPANY)
OF AMERICA, a foreign)
corporation; GUARDIAN PLAN OF)
GROUP INSURANCE; OUTDOOR CAP)
CO., INC., a foreign)
corporation; and, PRIVATE)
HEALTHCARE SYSTEMS, INC., a)
foreign corporation,)

ENTERED ON DOCKET

Defendants.)

DATE OCT 12 1995

FILED

OCT 11 1995

Richard M. Lawrence, Court Clerk
U.S. DISTRICT COURT

ORDER OF DISMISSAL WITH PREJUDICE

NOW ON this 5th day of Oct, 1995, it appearing to
the Court that this matter has been compromised and settled, this
case is herewith dismissed with prejudice to the refiling of a
future action.

S/ SVEN ERIK HOLMES

United States District Judge

334\67\dwp.eid\PTB

NOTE: THIS ORDER IS TO BE MAILED
BY MOVANT TO ALL COUNSEL AND
PRO SE LITIGANTS IMMEDIATELY
UPON RECEIPT.